CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 24, 113, and 142

(T.D. 93–37)

RIN–1515–AB15

ASSESSMENT OF LIQUIDATED DAMAGES FOR FAILURE TO DEPOSIT ESTIMATED DUTIES, TAXES AND CHARGES OR TO REMIT PASSENGER PROCESSING FEES TO CUSTOMS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to provide for the assessment of liquidated damages for failure to deposit estimated duties, taxes and charges timely on imported merchandise entered for consumption. Such charges would include certain ad valorem fees, fees relating to dutiable mail and harbor maintenance fees provided by regulation. The Regulations are also amended to allow the appropriate district director the discretion to require presentation of entry summary documentation and payment of applicable duties, taxes and charges on imported merchandise at the time of entry (and before the release of the merchandise from Customs custody), if the importer has not taken prompt action to settle a prior claim for liquidated damages for failure to deposit estimated duties, taxes and charges in a timely manner. The document further amends the Customs Regulations to provide for liquidated damages against international carriers who collect passenger processing fees as required by law, but who fail to remit those fees to Customs in a timely manner.

EFFECTIVE DATE: June 28, 1993.

FOR FURTHER INFORMATION CONTACT: Jeremy Baskin, Penalties Branch (202–482–6950).

SUPPLEMENTARY INFORMATION:

BACKGROUND

In a notice of proposed rulemaking published in the Federal Register on February 6, 1992 (57 FR 4589), Customs announced its intention to amend §§ 24.24(h), 113.62(k), 113.64(a), 142.13 and 142.25, Customs

Regulations (19 CFR 24.24(h), 113.62(k), 113.64(a), 142.13 and 142.25) to provide for a specific measure of liquidated damages against a bond principal and surety when a bond principal fails to deposit estimated duties, taxes and charges with Customs in a timely manner, to permit sanctioning of any principal who fails to take prompt action in settlement of any claim for liquidated damages arising from the failure to deposit estimated duties, taxes and charges with Customs in a timely manner, and to permit the assessment of liquidated damages against a passenger-transporting carrier who is responsible for the remittance of collected passenger processing fees to Customs.

As stated in the notice of proposed rulemaking, the filing of Customs entry and entry summary documents, and the deposit of estimated duties, taxes and charges, constitute separate obligations under the importer's bond. Specifically, under the provisions of § 113.62(b), Customs Regulations (19 CFR 113.62(b)), the principal on the bond (importer) agrees to timely file such documentation *(i.e.,* entry and entry summary documentation) as is necessary to enable Customs to release the imported merchandise from Customs custody, properly assess duties, collect accurate statistics and ascertain whether applicable requirements of law and regulation are met. As provided in § 113.62(a)(1)(i), Customs Regulations (19 CFR 113.62(a)(1)(i)), the principal and the surety on the bond are responsible, jointly and severally, for the timely deposit of any duties, taxes and charges imposed or estimated to be due at the time the merchandise is released or withdrawn from Customs custody.

Under the provisions of § 113.62(k), Customs Regulations (19 CFR 113.62(k)), if the bond principal defaults with regard to the timely presentation of entry and entry summary documentation as set forth in § 113.62(b), the obligors on the bond, both principal and surety, jointly and severally, agree to pay liquidated damages in the amount of the value of the merchandise involved in the default.

However, as noted in the notice of proposed rulemaking, in contrast with the foregoing, any default regarding the timely payment of estimated duties, taxes and charges required by § 113.62(a)(1)(i) does not result in the assessment of damages. When a default arises from either a failure to deposit estimated duties, taxes and charges at the time of presentation of the entry summary, or from a return of a duty check by a financial institution because of insufficient funds or any other negotiability problem, or from an untimely electronic transfer of funds under the Automated Clearinghouse (ACH), or an ACH payment which is voided because of insufficient funds, Customs remedy involves assertion of a claim for duties, taxes and charges against the principal and surety for breach of the bond condition stated in § 113.62(a)(1)(i).

The notice of proposed rulemaking proposed to amend § 113.62 to provide specifically for the assessment of liquidated damages when a bond principal defaults in respect to the timely payment of estimated duties, taxes and charges. In this connection, "duties, taxes and charges" would include any applicable ad valorem fees described in

§ 24.23, Customs Regulations (19 CFR 24.23), fees for dutiable mail described in § 24.22(f), Customs Regulations (19 CFR 24.22(f)), or harbor maintenance fees described in § 24.24(e)(3)(i) and (ii), Customs Regulations (19 CFR 24.24(e)(3)(i) and (ii)).

When neither the entry summary documentation is provided, nor estimated duties, taxes and charges provided in a timely manner (a nonfile), the proposed amendment would make it clear that liquidated damages would be assessed in an amount equal to the value of the merchandise consistent with the bond provision applicable for failure to timely present the entry summary documentation. Multiple claims would not be assessed when both the documentation and estimated duties are not submitted.

Under § 142.13, Customs Regulations (19 CFR 142.13), the district director is empowered to require that entry summary documentation be filed and that estimated duties, taxes and charges be deposited at the time of entry if the importer has repeatedly failed to file entry summary documentation timely, has not taken prompt action to settle claims for liquidated damages for failure to file timely, or has repeatedly delivered entry summary documentation which is incomplete or which contains erroneous information. Additionally, § 142.25, Customs Regulations (19 CFR 142.25), permits the district director to discontinue immediate delivery privileges for these same reasons. Consequently, the notice of proposed rulemaking further proposed to amend § 142.13 and 142.25 to permit the district director to require presentation of entry summary as well as payment of estimated duties, taxes and charges at the time of entry (and thus before the release of the merchandise), or to suspend immediate delivery privileges, if the importer has not taken prompt action to settle a prior claim for liquidated damages issued for failing to deposit estimated duties, taxes and charges in a timely manner in violation of § 113.62(a)(1)(i).

Inasmuch as the proposed amendment of § 113.62 would provide for specific liquidated damages against importers who fail to pay the harbor maintenance fee, it was also proposed to amend § 24.24(h)(1), Customs Regulations (19 CFR 24.24(h)(1)), to state specifically that importers who fail to pay the harbor maintenance fee thereunder shall incur liquidated damages consistent with the provisions of § 113.62. In concert with this, § 24.24(h)(2) and (h)(3), Customs Regulations (19 CFR 24.24(h)(2) and (h)(3)), were proposed to be amended to indicate, respectively, that importers against whom liquidated damages claims have been assessed may petition for relief in accordance with the procedures set forth in Part 172, Customs Regulations (19 CFR Part 172), and that mitigation shall be afforded from such claims consistent with guidelines published for cancellation of claims for the untimely payment of estimated duties, taxes and charges.

The notice of proposed rulemaking also proposed the amendment of § 113.64, Customs Regulations (19 CFR 113.64), concerning International Carrier Bonds, in order to allow assessment of liquidated dam-

ages against carriers who fail to pay passenger processing fees over to Customs no later than 31 days after the close of the calendar quarter in which they were collected pursuant to § 24.22(g), Customs Regulations (19 CFR 24.22(g)). The proposed amendment would provide for liquidated damages equal to two times the collected passenger processing fees which are not remitted to Customs as prescribed by regulation. The amendment provides for the payment of fees to Customs which have been paid to the carriers by passengers but which have not been timely remitted to Customs.

Eighteen comments were received in response to the notice of proposed rulemaking. Seven of the comments addressed the proposed liquidated damages for failure to remit the passenger processing fee. The remaining comments addressed the proposed amendment to provide for liquidated damages for late payment of estimated duties, fees and taxes. A discussion of the comments submitted, followed by Customs response thereto, is set forth below.

FAILURE TO REMIT PASSENGER PROCESSING FEES

Comment:

All seven comments which addressed the issue of late remittance of the passenger processing fees were opposed to the amendment on the grounds that imposing a liquidated damages amount of double the collected but unremitted fee bears no reasonable relationship to the amount of damages which might accrue to the Customs Service as a result of late remittance of the collected user fees. Some commenters alleged that the proposed liquidated damages amount would constitute a grossly disproportionate and totally unjustified penalty for an inadvertent and possibly unavoidable remittance delay. The commenters also suggested that a liquidated damages provision that does not constitute a reasonable forecast of the damages likely to actually result from the breach is not enforceable. One commenter stated that Customs lacks the legal authority to assess liquidated damages because the provisions of 19 U.S.C. 66 only authorize the Secretary of the Treasury to require the posting of bonds to protect against loss of revenue from imports. The commenter noted that no authority exists in the Tariff Act of 1930 which would permit Customs to authorize bonds for the purpose of collecting user fees. Finally, that same commenter noted that Customs has adequate remedies in existing statute, specifically the Debt Collection Act of 1982, and that the proposed liquidated damages would dramatically and unnecessarily raise a carrier's contingent liabilities and its surety costs based upon no showing of need or authority.

Response:

Customs does not agree with these comments. Initially, it should be noted that the provisions of 19 U.S.C. 1623 permit the Secretary of the Treasury to require, or authorize Customs officers to require, such bonds or other security as may be deemed necessary for the protection of the revenue or to assure compliance with any provision of law. The

Secretary is also empowered to fix the amount of liquidated damages thereunder. Accordingly, Customs is of the view that sufficient legal authority exists for the Secretary to require bonds to guarantee the remittance to Customs of collected passenger processing fees and to fix the liquidated damages.

The commenters suggest that the amount of liquidated damages proposed to be assessed does not bear a reasonable relationship to the harm suffered by the Government for the failure to remit the collected fees as required by law. Customs does not agree. Customs has set the amount of liquidated damages at two times the amount of the collected but unremitted fees because the harm suffered by the Government is difficult to quantify in every case. If a party responsible for the collection of the fees fails to remit them to Customs, the Government suffers the damage of non-collection of the fee plus loss of use of the funds. Granted, if the fee is late by only one day, the Government's loss does not approach two times the amount of the fee. However, if the fee is never paid, the Government sustains the collected but unremitted fees plus loss of use of the money for all time, a measure of damage that cannot be quantified easily. Accordingly, Customs is of the view that liquidated damages equal to two times the collected but unremitted fees provides a reasonable calculation of potential harm from the breach.

Under the provisions of 19 U.S.C. 1623(c), the Secretary of the Treasury may authorize the cancellation of any bond charge, in the event of a breach of any condition of the bond, upon the payment of such lesser amount as he may deem sufficient. Provisions for filing petitions for relief from liquidated damages appear in Part 172 of the Customs Regulations (19 CFR Part 172). Guidelines for the cancellation of these bond charges for late remittance of collected fees will be published at a future date.

Customs is further of the view that issuance of liquidated damages is the most procedurally efficient method of encouraging compliance with laws and regulations governing the payment to Customs of collected passenger processing fees as opposed to relying on other remedies outside of the bond structure. Customs is also of the view that the possibility of swift action under the terms of the bond will provide a deterrent effect to negligent behavior. Accordingly, the amendment to the Regulations permitting the assessment of liquidated damages for failing to remit collected passenger processing fees in a timely manner is being promulgated unchanged from the proposed regulation.

Late Payment of Estimated Duties, Taxes and Charges

Comment:

Eleven comments were received on this proposed amendment. Two of the commenters were in favor of the proposed amendment, one commenter offered only technical comments and neither favored nor opposed the proposed amendment and the remaining commenters either opposed the proposed amendment or claimed that it was unnecessary.

One commenter believed it to be unnecessary to establish liquidated damages for the failure to deposit estimated duties, taxes, and other charges in a timely fashion because there is another more effective procedure which should be utilized, *i.e.*, the suspension of immediate delivery privileges. It was averred that Customs already has the authority to sanction delinquent importers who repeatedly fail to file entry documentation, who have not taken prompt action to settle non-file liquidated damages claims, or who repeatedly submit erroneous entry documentation. The commenter suggested that this sanctioning authority should be expanded to provide for immediate sanctioning of any importer who fails to timely pay estimated duties, taxes and charges because liquidated damages assessments are not a strong inducement to pay nor a deterrent to future violations. The commenter believed that placing an importer on a cash basis before the importer can obtain release of goods is the most efficient enforcement method to ensure timely payment of estimated duties, taxes and charges. The commenter opined that the proposed amendment will only frustrate Customs collection efforts and increase the likelihood of non-payment because it would authorize immediate delivery suspension only after exhaustion of the liquidated damages process.

Response:

As the commenter noted, Customs has the authority to sanction delinquent importers who repeatedly fail to file entry documentation, who have not taken prompt action to settle non-file liquidated damages claims, or who repeatedly submit erroneous entry documentation. However, an importer who presents accurate entry summary documentation in a timely fashion but who fails to deposit estimated duties, waits for Customs demand for payment and then immediately satisfies the demand, currently cannot be the subject of a sanction action. Under the proposed regulatory amendment, that importer will not be able to avoid liquidated damages liability, as the bond breach occurs when the monies are not deposited by the tenth working day after entry is made or release of the goods is effected. Customs is also of the view that the possibility of incurring a claim for liquidated damages for non-payment will provide sufficient inducement to an importer to pay on time. In fact, Customs believes that the threat of imposition of liquidated damages will enhance collection efforts because the necessity for billing will be reduced.

LIQUIDATED DAMAGES AGAINST BOND PRINCIPAL

Comment:

One commenter inquired as to whether the "Option 1" mitigation standards articulated in T.D. 89–48 for late filing of entry summary liquidated damages claims will be available for late payment of estimated duties, taxes and charges should Customs decide to promulgate the amendments as proposed. Additionally, the commenter inquired as

to whether harbor maintenance fees would be added to the calculation for duties in those situations where an importer fails to file any duties, taxes or charges.

Response:

Any unpaid harbor maintenance fees will be included in arriving at the amount of estimated duties, taxes and charges for purposes of calculating liquidated damages to be assessed. Nonpayment of the harbor maintenance fee will result in the assessment of liquidated damages at twice the unpaid revenue or $1000, whichever is greater, and not in an amount equal to the value of the merchandise upon which the fee is calculated.

The cancellation of bond claims is a matter of administrative discretion and is not the subject of public comment and review.

Comment:

Two commenters expressed concern about the assessment of liquidated damages in a statement entry situation, where a Customs broker files numerous entry summaries in a single statement and includes one check for payment of all estimated duties, taxes and charges or transmits the payment through the Automated Clearinghouse. The commenters believe that the untimely filed check or the untimely transmitted ACH payment authorization should be treated as a single late payment against the filing Customs broker without regard to the number of entries which may be covered by that statement.

Response:

Unless the broker is the importer of record on all the bonds which were obligated for the estimated duty payments on the statement, Customs cannot, as a matter of law, proceed with liquidated damages against the broker, because the broker is acting only as an agent of the bond principals and is not a party to the bond contract. The commenters' concern can be addressed in standards for the cancellation of bond charges, but cannot be changed in the regulations themselves. New bond cancellation standards addressing this issue are being formulated and will be published soon.

Comment:

One commenter suggested that specific language be incorporated into the proposed regulation which would require the use of the "Option 1" parking ticket approach to cancel these claims for liquidated damages.

Response:

Customs does not agree. The cancellation of claims is a matter of administrative discretion which is not the subject of comment and review. For this reason, Customs does not believe mitigation guidelines belong within the body of the Regulations.

Comment:

Three commenters noted that Customs should refrain from assessing liquidated damages when a computer "glitch" results in the untimely

transmittal of funds via ACH. The party generally responsible for the ACH transmittal is the Customs broker handling the statement transaction. One of those three commenters suggested that Customs inform the broker, who would then be responsible for correcting the situation. If the broker fails to correct the situation, the commenter suggested that the broker should be the subject of a penalty for violation of the provisions of 19 U.S.C. 1641.

Response:

The subject proposed amendments relate only to claims for liquidated damages for nonpayment of estimated duties, taxes and charges. They do not address § 1641 penalties for broker malfeasance. As a matter of policy, Customs always retains the enforcement discretion to refrain from assessing claims for liquidated damages and penalties, however, rulemaking is not the appropriate forum for articulating enforcement policy.

Comment:

One commenting surety objected to the proposed amendments, noting that the imposition of liquidated damages for late payment of estimated duties would penalize the surety for acts of the principal which are not under the direct control or directions of the surety.

Response:

Customs disagrees with this statement. Bond principals do not seek the concurrence of the surety in their actions. Rather, the surety steps in to make the Government whole when a principal breaches and fails to pay obligations required of him by the bond. Control over the principal by the surety is not an issue which can be treated in amendments to the Customs Regulations.

Comment:

One commenter asserted that Customs should permit 30 days for the payment of estimated duties, taxes and charges before the payment is considered late and liquidated damages assessed.

Response:

The length of time that the importer of record has to pay estimated duties, taxes and charges is not the subject of this proposed amendment and will not be addressed here.

Comment:

Another commenter noted that the proposed liquidated damages provision will not deter the typical violator from the improper payment of duties. The commenter states that the typical scenario involves an importer or broker deliberately and fraudulently denying Customs the revenue which is due and owing. As such, the obligations fall on the surety and the proposed amendment will add yet another obligation. This commenter also suggested the use of current sanctioning actions against recalcitrant importers or other bond principals who fail to deposit estimated duties in a timely manner.

Response:

Customs does not agree with the commenter's description of the typical scenario for a late payment of estimated duties, taxes and charges. Very few of these instances result from an overt fraudulent act. Further, principal sanctioning does not serve to make the Government whole from the loss suffered, it merely serves to limit future liabilities. Customs is of the view that the changes provide for the most effective method of gaining swift compliance with regard to the payment of estimated duties.

Comment:

That same commenter suggested that Customs assess penalties under 19 U.S.C. 1592, against importers who fail to pay estimated duties timely, or under 19 U.S.C. 1641, against Customs brokers who fail to properly remit duties. The commenter believed that a finding of culpability is a more equitable means of assessing liability in these cases.

Response:

Customs does not agree. Many cases arise because duty checks are dishonored by financial institutions or payments are either electronically transferred late or have insufficient funds in the electronic account. To assess monetary penalties against importers who fail to deposit estimated duties, taxes and charges timely in these cases would result in overly harsh assessments of up to eight times the loss of revenue. Many non-payment violations are not based on fraud or gross negligence and do not warrant § 1592 penalties. Additionally, cases brought under §§ 1592 and 1641 are the most labor-intensive of all penalty cases to process. Customs processes thousands of late filing cases each year. Compared to the the number of entries filed with Customs each year, the number which are filed late comprises an extremely low percentage of entries. Still, the administrative burden of keeping up with these cases is substantial. It would not be administratively efficient to establish § 1592 or 1641 penalty cases each time an estimated duty payment was filed late.

Comment:

One commenter, a surety, noted that the proposed regulatory amendments provide no procedural safeguards to a surety. Under current procedures, when an estimated duty payment is not made to Customs timely, a debit voucher is processed by Customs and a demand for duties is made on surety. The surety noted that many times the demand is not made until months after the failure to deposit estimated duties has occurred (often in the form of a check for estimated duties, taxes and charges which is returned by the financial institution for insufficient funds) and the bond principal cannot be found. The surety believed that under the proposed regulations, the surety would be responsible for liquidated damages as well as payment of the estimated duties when in many cases it is never notified of the liability in a timely manner. The commenting surety suggested that, in order to achieve fairness, Cus-

toms must be required to give notice to the surety within a reasonable period of time after discovery of the non-payment. The surety suggested that language be added to § 113.62(k)(4), which would make the surety jointly and severally liable for liquidated damages if within 30 days of notification of the principal's default, the principal or surety has not paid the unpaid duties, taxes and charges (or petitioned Customs for relief of such payment). In no case should Customs seek liquidated damages from surety if written notice has not been given to the surety within 30 days after the date of default or the date of return of the dishonored check, or within 90 days after the end of a reporting quarter.

Response:

Pursuant to the provisions of § 172.1(a), Customs Regulations (19 CFR 172.1(a)), when Customs issues a demand for payment of liquidated damages from the bond principal, a copy of that demand is issued to the surety. Although not a formal demand on the surety, this courtesy copy provides the surety with notice that a claim has been made against the principal and affords the surety the opportunity to contact the principal and assist him in settlement of the claim. Pursuant to § 172.12(b)(2), Customs Regulations (19 CFR 172.12(b)(2)), if the principal does not pay or does not petition the claim, Customs is required to notify the surety within 10 days after the expiration of the petitioning period. The surety is then afforded 60 days to file a petition for relief. Customs is of the view that the procedural safeguards which the commenting surety seeks already exist in the provisions of the Customs Regulations. Accordingly, Customs concludes that the proposed language provided by surety is not necessary.

Comment:

The same commenter noted that it was not afforded an opportunity to assess this proposed risk in writing its current bonds, and, therefore, a delayed effective date must be imposed. The surety took the view that this potential liability should only apply to future bonds which are written.

Response:

The bond conditions are being amended to encourage payment of estimated duties, taxes and charges by principals in a timely manner. Under the current regulatory scheme, bond principals who fail to deposit estimated duties in a timely manner and their sureties are subject to demands for payment of those duties. The amendment would thus not change the surety's obligation for payment of those unpaid duties, taxes and charges. Also, if sureties believe the risk incurred by the new liquidated damages potential is too great, they are always at liberty to terminate bonds pursuant to the provisions of § 113.27, Customs Regulations (19 CFR 113.27).

Comment:

One commenter stated that the proposed amendments were unnecessary because the current regulations in § 141.0a(d) defines "filing" of an

entry as the delivery of entry documentation along with estimated duties. Accordingly, it was the commenter's view that the failure to deposit estimated duties, taxes and charges constituted a late filing of an entry summary.

Response:

The deposit of estimated duties and the filing of entry documents may constitute a "filing" for purposes of Part 141 of the Regulations, but the terms of the current basic importation bond (19 CFR 113.62) provide for liquidated damages for failure to file documentation in violation of the provisions of § 113.62(b), and do not provide for liquidated damages for failing to deposit estimated duties (19 CFR 113.62(a)). Through these amendments, Customs is changing the terms of the bond to provide for liquidated damages for the failure to deposit estimated duties.

Conclusion

After careful consideration of the comments received and further review of the matter, Customs has concluded that the amendments should be adopted without modification. However, for editorial purposes, the specific references to Part 113 have been omitted from §§ 24.24(h)(1), 142.13(a)(2) and 142.25(a)(2). Guidelines for the cancellation of bond charges involving the failure to deposit estimated duties, taxes and charges or the failure to remit collected passenger processing fees to Customs in a timely manner will be published shortly.

Regulatory Flexibility Act

Inasmuch as the amendments will encourage the lawful and timely payment of estimated duties, taxes and charges and will discourage and deter their negligent non-payment, it is hereby certified, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.),* that the amendments set forth in this document should not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in section 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Paperwork Reduction Act

The collection of information contained in this final regulation is in §§ 24.24, 113.62 and 113.64. In the event liquidated damages were to be assessed by Customs for failure to timely deposit estimated duties, taxes or charges due on imported merchandise entered for consumption, it would be necessary for the party to file a petition for relief with Customs in order to mitigate or cancel the claim for liquidated damages. The likely respondents would be businesses. The collection of information

contained in this final regulation has been approved by the Office of Management and Budget (OMB) under 1515–0187. The estimated average annual burden associated with this collection of information is one hour per respondent or recordkeeper, depending on individual circumstances. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Office of Management and Budget, Attention: Desk officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503, with copies to the U.S. Customs Service at the address previously specified.

DRAFTING INFORMATION

The principal author of this document was Russell Berger, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 24
Accounting, Claims, Customs duties and inspection, Imports, Taxes, Wages.

19 CFR Part 113
Customs bonds.

19 CFR Part 142
Customs duties and inspection, Imports.

AMENDMENTS TO THE REGULATIONS

Accordingly, Parts 24, 113 and 142, Customs Regulations (19 CFR Parts 24, 113 and 142) are amended as set forth below.

PART 24 – CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The general authority citation for Part 24 continues to read as follows, as does the specific sectional authority for § 24.24, while the specific sectional authorities for §§ 24.12 and 24.32 are amended to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 58a–58c, 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States (HTSUS)), 1624, 31 U.S.C. 9701, unless otherwise noted.

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Section 24.12 also issued under 19 U.S.C. 1524, 46 U.S.C. 31302;

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Section 24.24 also issued under 26 U.S.C. 4461, 4462;

* * * * * * *

Section 24.32 also issued under 5 U.S.C. 5582, 5583;

* * * * * * *

2. Section 24.24 is amended by revising the headings of paragraphs (h) and (h)(1), and by adding a sentence to the ends of paragraph (h)(1), paragraph (h)(2) and paragraph (h)(3), to read as follows:

§ 24.24 Harbor maintenance fee.

* * * * * * *

(h) *Penalties/liquidated damages for failure to pay harbor maintenance fee and file summary sheet.* (1) *Amount of penalty or damages.* * * * An importer shall be liable for payment of liquidated damages under the basic importation and entry bond, for failure to pay the harbor maintenance fee, as provided in such bond.

(2) * * *Any application to cancel liquidated damages incurred shall be made in accordance with part 172 of this chapter.

(3) * * * Any liquidated damages assessed under this provision shall be mitigated in a manner consistent with guidelines published by the authority of the Commissioner of Customs for cancellation of claims for untimely payment of estimated duties, taxes and charges.

* * * * * * *

PART 113—CUSTOMS BONDS

1. The authority citation for Part 113 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624. Subpart E also issued under 19 U.S.C. 1484, 1551, 1565.

2. Section 113.62 is amended by adding a new paragraph (k)(4) to read as follows:

§ 113.62 Basic importation and entry bond conditions.

* * * * * * *

(k) * * *

(4) If the principal defaults on agreements in the condition set forth in paragraph (a)(1)(i) of this section only, the obligors (principal and surety, jointly and severally) agree to pay liquidated damages equal to two times the unpaid duties, taxes and charges estimated to be due or $1,000, whichever is greater. A default on the condition set forth in paragraph (a)(1)(i) of this section shall be presumed if any monetary instrument authorized for the payment of estimated duties, taxes and charges by § 24.1(a) of this chapter is returned unpaid by a financial institution, or if a payment authorized under Automated Clearinghouse (see § 24.25 of this chapter) is not transmitted electronically to Customs in a timely manner. If the principal defaults on agreements in both of the conditions as set forth in paragraphs (a)(1)(i) and (b) of this section, the measure of liquidated damages assessed shall be as provided in paragraph (k)(1) of this section for a default of the agreements in the condition set forth in paragraph (b) of this section. For purposes of this paragraph, the phrase "unpaid duties, taxes and charges" shall include any appropriate ad valorem fees described in § 24.23 of this chapter, fees relating to dutiable mail described in § 24.22(f) of this chapter, and harbor maintenance fees described in § 24.24(e)(3)(i) and (ii) of this chapter.

3. Section 113.64 is amended by adding a new sentence to the end of paragraph (a) to read as follows:

§ 113.64 International carrier bond conditions.

(a) * * * If the principal (carrier) fails to pay passenger processing fees to Customs no later than 31 days after the close of the calendar quarter in which they were collected pursuant to § 24.22(g) of this chapter, the obligors (principal and surety, jointly and severally) agree to pay liquidated damages equal to two times the passenger processing fees which have been collected but not timely paid to Customs as prescribed by regulation.

* * * * * * *

PART 142—ENTRY PROCESS

1. The authority citation for Part 142 continues to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

2. Section 142.13 is amended by revising the first sentence of paragraph (a)(2) to read as follows:

§ 142.13 When entry summary must be filed at time of entry.

(a) * * *

(2) Has not taken prompt action to settle a claim for liquidated damages issued under § 142.15 for failure to file entry summary documentation timely, or a claim for liquidated damages issued under the basic importation and entry bond for failure to deposit estimated duties, taxes and charges timely, as provided in such bond. * * *

* * * * * * *

(a) * * *

2. Section 142.25 is amended by revising the first sentence of paragraph (a)(2) to read as follows:

§ 142.25 Discontinuance of immediate delivery privileges.

* * * * * * *

(2) Has not taken prompt action to settle a claim for liquidated damages issued under § 142.27 for failure to file the applicable Customs documentation set forth in § 142.22(b) timely, or a claim for liquidated damages issued under the basic importation and entry bond for failure to deposit estimated duties, taxes and charges timely, as provided in such bond.* * *

* * * * * * *

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: May 10, 1993.
RONALD K. NOBLE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 28, 1993 (58 FR 30979)]

ERRATA

~~(T.D. 93–33)~~
(T.D. 93–35)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR APRIL 1993

~~(T.D. 93–34)~~
(T.D. 93–36)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR APRIL 1993

SUMMARY: T.D. 93–33 and 93–34 were originally published in the CUSTOMS BULLETIN, Vol. 27, No. 20, dated May 19, 1993, appearing on pages 1–4.

Please note the following corrections:

T.D. 93–33 has been renumbered T.D. 93–35; and
T.D. 93–34 has been renumbered T.D. 93–36.

U.S. Customs Service

General Notices

19 CFR Part 175

RECEIPT OF DOMESTIC INTERESTED PARTY PETITION CONCERNING CLASSIFICATION OF DOWN COMFORTERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of receipt of domestic interested party petition; solicitation of comments.

SUMMARY: Customs has received a petition submitted on behalf of a domestic interested party concerning the tariff classification of certain down comforters. Customs has held in certain rulings regarding certain down comforters with an outer shell of cotton that the outer cotton shell determines the classification of the comforters at the subheading level of the Harmonized Tariff Schedule of the United States (HTSUS) and the textile category of the comforters. The petitioner claims that the down filling imparts the essential character to these comforters and thus believes the comforters should be classified at a different subheading level, resulting in a higher rate of duty and different textile category. This document invites comments regarding the correctness of Customs classification of these comforters.

DATE: Comments must be received on or before June 28, 1993.

ADDRESS: Comments (preferably in triplicate) may be submitted to the U.S. Customs Service, Office of Regulations and Rulings, Regulations Branch, Franklin Court, 1301 Constitution Ave., NW., Washington, D.C. 20229. Comments may be viewed at the Office of Regulations and Rulings, Franklin Court, 1099 14th Street, NW., suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Craig Clark, Commercial Rulings Division, U.S. Customs Service, (202) 482–7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), a petition has been filed by a domestic interested party concerning the classification of certain down comforters with an outer shell of

cotton in subheading 9404.90.80, HTSUS, subject to a Column 1 rate of duty of 5 percent *ad valorem*.

Heading 9404, HTSUS, provides for articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered.

In HQ 084000 (June 16, 1989), Customs held that a down comforter was classified as an article of bedding and similar furnishing, other, other, of cotton, not containing any embroidery, lace, braid, edging, trimming, piping exceeding 6.35 millimeters or applique work in subheading 9404.90.80, HTSUS, subject to a Column 1 rate of duty of 5 percent *ad valorem* and textile category 362. This down comforter had a shell made of 100 percent cotton fabric, a filling of white goose down, and a piping of less than 6.35 millimeters on all four edges.

In HQ 086080 (February 9, 1990), Customs held that a down comforter was classified in subheading 9404.90.80, HTSUS, subject to a Column 1 rate of duty of 5 percent *ad valorem* and textile category 362. This down comforter had a 100 percent woven quilted shell and a filling of 100 percent goose down, but had no external decorative work.

In HQ 084000 and HQ 086080 Customs has determined, therefore, that it is the outer cotton shell that determines the classification of these down comforters at the subheading level, making them classifiable as "of cotton."

The petitioner contends that it is the down filling, and not the outer cotton shell, that imparts the essential character in application of General Rule of Interpretation (GRI) 3(b) to the down comforters and should determine the classification at the subheading level. Consequently, the petitioner submits that the proper classification of the down comforters with cotton covers is as "other, other, other, other," in subheading 9404.90.9060, HTSUS, a residual provision within heading 9404, subject to a duty rate of 14.5 percent *ad valorem* and textile category 899.

COMMENTS

Pursuant to section 175.21(a), Customs Regulations (19 CFR 175.21(a)), before making a determination on this matter, Customs invites written comments from interested parties on this issue. The petition of the domestic interested party, as well as all comments received in response to this notice, will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, U.S. Customs Service, Office of Regulations and Rulings, Franklin Court, 1099 14th St., NW., suite 4000, Washington, D.C.

AUTHORITY

This notice is published in accordance with section 175.21(a), Customs Regulations (19 CFR 175.21(a)).

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: May 20, 1993.
RONALD K. NOBLE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 27, 1993 (58 FR 30726)]

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 6–1993)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of April 1993 follow. The last notice was published in the CUSTOMS BULLETIN on May 12, 1993.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: May 24, 1993.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The lists of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9300092	19930408	20130408	BUGS BUNNY STYLE GUIDE (1992)	WARNER BROS.	N
COP9300093	19930409	20130409	ILLUMINADA BOX	CATALINA LIGHTING INC.	N
COP9300094	19930412	20130412	TAZ-MANIA STYLE GUIDE (1991)	WARNER BROS.	N
COP9300095	19930412	20130412	TWEETY STYLE GUIDE (1992)	WARNER BROS.	N
COP9300096	19930412	20130412	SYLVESTER JR. STYLE GUIDE (1992)	WARNER BROS.	N
COP9300097	19930412	20130412	SYLVESTER STYLE GUIDE (1992)	WARNER BROS.	N
COP9300098	19930413	20130413	PHOTO FRAME LOVABLE	JOELSON INDUSTRIES, INC.	N
COP9300099	19930413	20130413	WILE E. COYOTE STYLE GUIDE (1992)	WARNER BROS.	N
COP9300100	19930413	20130413	DANNY THE HAPPY DINO	DOLLY DOLLS & TOYS FTY., LTD.	N
COP9300101	19930413	20130413	MONA THE HAPPY DINO	DOLLY DOLLS & TOYS FTY., LTD.	N
COP9300102	19930413	20130413	BOBO THE BABY DINO	DOLLY DOLLS & TOYS FTY., LTD.	N
COP9300103	19930414	20130414	IBM OS/2 LOCAL AREA NETWORK (LAN) SERVER VERSION 2.0	INTERNATIONAL BUSINESS MACHINES	N
COP9300104	19930415	20130415	OS/2 2.0	INTERNATIONAL BUSINESS MACHINES	N
COP9300105	19930415	20130415	MULTIMEDIA PRESENTATION MANAGER TOOLKIT/2	INTERNATIONAL BUSINESS MACHINES	N
COP9300106	19930415	20130415	IBM SAA DISTRIBUTED DATABASE CONNECTION SERVICES/2	INTERNATIONAL BUSINESS MACHINES	N
COP9300107	19930415	20130415	IBM EXTENDED SERVICES FOR OS/2 AND IBM EXTENDED SERVICE	INTERNATIONAL BUSINESS MACHINES	N
COP9300108	19930415	20130415	IBM PERSONAL SYSTEM/2 MODEL 35/40 BASIC INPUT/OUTPUT	INTERNATIONAL BUSINESS MACHINES	N
COP9300109	19930415	20130415	YOSHI (DMG)	NINTENDO OF AMERICA INC.	N
COP9300110	19930415	20130415	YOSHI (NES)	NINTENDO OF AMERICA INC.	N
COP9300111	19930415	20130415	LETHAL ENFORCERS	KONAMI INC.	N
COP9300112	19930415	20130415	X-MEN	KONAMI INC.	N
COP9300113	19930415	20130415	HALLOWEEN TREE WIRE BRANCHES AND DETACHABLE	TRENDMASTERS, INC.	N
COP9300114	19930430	20130430	PINEAPPLE	PEKING HANDICRAFT, INC.	N
COP9300115	19930415	20130415	OFFICIAL BASEBALL CARD COLLECTOR	KONAMI, INC.	N
COP9300116	19930415	20130415	CHEMBUNNY	KAREN L. GUILE	N
COP9300117	19930415	20130415	CHEMMAN	KAREN L. GUILE	N
COP9300118	19930419	20130419	JURASSIC PARK	UNIVERSAL CITY STUDIOS, INC.	N
COP9300119	19930420	20130420	STRAWBERRY HUMMINGBIRD FEEDER	BRIGGS ASSOCIATE INC.	N
COP9300120	19930421	20130421	FLYING FUTURE TRAINS	CHAIN FONG TOYS CO. LTD.	N
COP9300121	19930421	20130421	FLYING FUTURE TRAINS	CHAIN FONG TOYS CO. LTD.	N
COP9300122	19930421	20130421	PATTERN #8133	CONCORD FABRICS, INC.	N
COP9300123	19930428	20130428	DOUBLE WEDDING RING	PEKING HANDICRAFT, INC.	N
COP9300124	19930428	20130428	DIAMONDS	PEKING HANDICRAFT, INC.	N
COP9300125	19930429	20130429	TEA TIME GARDEN DESIGN #4478	CRANSTON PRINT WORKS CO.-V.I.P.	N
COP9300126	19930429	20130429	COW	LILY WONG'S UNLIMITED	N
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COP9300128	19930429	20130429	COW DRESSED IN CLOTHING	LILY WONG'S UNLIMITED	N
COP9300129	19930429	20130429	BOUQUET DESIGN #4301	CRANSTON PRINT WORKS CO.-V.I.P.	N
COP9300130	19930429	20130429	DEGRAVE ROSES/TOSSED DESIGN #3718	CRANSTON PRINT WORKS CO.-V.I.P.	N
COP9300131	19930430	20130430	VICTORIAN ROSE VINE DESIGN #4465	CRANSTON PRINT WORKS CO.-V.I.P.	N
COP9300132	19930430	20130430	VINERY DESIGN #4551/4605	CRANSTON PRINT WORKS CO.-V.I.P.	N
COP9300133	19930430	20130430	BURGUNDY EIGHT POINT STAR QUILT - IRISH ROSE COLLECTION	L. KEE & CO., INC.	N
COP9300134	19930430	20130430	BURGUNDY DOUBLE WEDDING RING QUILT - SOPHIA COLLECTION	L. KEE & CO., INC.	N
COP9300135	19930430	20130430	MULTIBIT PERFUME BOTTLE/SCULPTURE(S)	THOMAS BUECHNER III	N

SUBTOTAL RECORDATION TYPE 44

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9300005	19930409	20021024	SCHWEIZ SUISSE SVIZZERA SWITZERLAND AND DESIGN	SCHWEIZERISCHE KASEUNION AG.	N
TMK9300251	19930406	20021117	MISCELLANEOUS DESIGN	AMERICAN FLANGE & MANUFACTURING	N
TMK9300252	19930407	20020609	HOG	HARLEY-DAVIDSON, INC.	N
TMK9300253	19930407	20020915	HOG	HARLEY-DAVIDSON, INC.	N
TMK9300254	19930408	20000911	EVERICH AND DESIGN	GOLDEN MILLION ENTERPRISES, INC.	Y
TMK9300255	19930408	20000501	GOLDEN BELL	GOLDEN MILLION ENTERPRISES, INC.	Y
TMK9300256	19930409	20020519	PLATINUM CARD	AMERICAN EXPRESS COMPANY	N
TMK9300257	19930409	19991124	GLADIATOR HEAD DESIGN	AMERICAN EXPRESS COMPANY	N
TMK9300258	19930409	20001113	AMERICAN EXPRESS CORPORATE CARD DESIGN	AMERICAN EXPRESS COMPANY	N
TMK9300259	19930409	20011113	AMERICAN EXPRESS WORLD SERVICE DESIGN	AMERICAN EXPRESS COMPANY	N
TMK9300260	19930409	20091128	OPTIMA CARD DESIGN	AMERICAN EXPRESS COMPANY	N
TMK9300261	19930409	20010714	AMEX	AMERICAN EXPRESS COMPANY	N
TMK9300262	19930409	19960203	AMERICAN EXPRESS BOX LOGO DESIGN	AMERICAN EXPRESS COMPANY	N
TMK9300263	19930409	19951111	AMERICAN EXPRESS	AMERICAN EXPRESS COMPANY	N
TMK9300264	19930409	20020616	5 ON 5	KONAMI INC.	N
TMK9300265	19930409	20020818	TURTLES IN TIME	KONAMI INC.	N
TMK9300266	19930409	20020616	DOUBLE DRIBBLE 5 ON 5	KONAMI INC.	N
TMK9300267	19930409	20020728	GRADIUM III	KONAMI INC.	N
TMK9300268	19930409	20020908	CASTLEVANIA II BELMONT'S REVENGE	KONAMI INC.	N
TMK9300269	19930409	20020728	THE LEGEND OF THE MYSTICAL NINJA	KONAMI INC.	N
TMK9300270	19930409	20020728	LASER INVASION	KONAMI INC.	N
TMK9300271	19930409	20020609	CYBER STADIUM SERIES	ULTRA SOFTWARE CORPORATION	N
TMK9300272	19930409	20020602	BASE WARS	ULTRA SOFTWARE CORPORATION	N
TMK9300273	19930413	20001218	SUN KIDS	SUN STYLE INTERNATIONAL, INC.	Y
TMK9300274	19930413	19980711	STAR TREK	PARAMOUNT PICTURES CORPORATION	N
TMK9300275	19930413	20090919	TOP GUN LOGO	PARAMOUNT PICTURES CORPORATION	N
TMK9300276	19930413	20020620	I.P. HYDE	HYDE MANUFACTURING COMPANY	N
TMK9300277	19930413	20080112	TAG HEUER AND DESIGN	TAG-HEUER S.A.	N
TMK9300278	19930413	20070606	HEUER AND DESIGN	TAG-HEUER S.A.	N
TMK9300279	19930413	20040728	KOKUHO ROSE BRAND DESIGN FOR RICE	KODA FARMS, INC.	N
TMK9300280	19930413	19991030	KOKUHO FOR RICE	KODA FARMS, INC.	N
TMK9300281	19930413	20040519	KOKUHO ROSE STYLIZED FOR RICE	KODA FARMS, INC.	N
TMK9300282	19930413	20040901	SHO-CHIKU-BAI BRAND DESIGN FOR RICE	KODA FARMS, INC.	N
TMK9300283	19930413	20041215	SHO-CHIKU-BAI FOR RICE	KODA FARMS, INC.	N
TMK9300284	19930413	20040901	DIAMOND K BRAND DESIGN FOR RICE FLOUR	KODA FARMS, INC.	N
TMK9300285	19930413	20040901	MOCHIKO BLUE STAR BRAND & DESIGN FOR RICE FLOUR	KODA FARMS, INC.	N
TMK9300286	19930413	20021229	GEMSTONE PLACED IN THE NAVEL OF A TROLL DOLL	ACE NOVELTY CO., INC.	Y
TMK9300287	19930415	20021027	MISCELLANEOUS DESIGN (SUPER NES LOGO)	NINTENDO OF AMERICA INC.	N
TMK9300288	19930415	20030327	MISCELLANEOUS DESIGN (COWBOY ON BUCKING HORSE)	H. D. LEE COMPANY, INC.	N
TMK9300289	19930415	20021124	OLYMPIA	SC AMERICA, INC.	Y
TMK9300290	19930415	19971217	IZOD	CRYSTAL BRANDS INC.	Y
TMK9300291	19930415	20030813	THOROBRED	JOCKEY INTERNATIONAL INC.	N
TMK9300292	19930415	20000217	ELANCE	JOCKEY INTERNATIONAL INC.	N
TMK9300293	19930415	20020620	LASER SCOPE	KONAMI INC.	N
TMK9300294	19930415	20030105	GEMSTONE PLACED IN THE NAVEL OF A TROLL DOLL	ACE NOVELTY COMPANY, INC.	Y
TMK9300295	19930415	20021229	GEMSTONE PLACED IN THE NAVEL OF A TROLL DOLL	ACE NOVELTY COMPANY, INC.	Y
TMK9300296	19930415	20080209	MARIE LOURDES	CHARTI JHUNJHNUWALA	N

05/14/93 U.S. CUSTOMS SERVICE PAGE 3
14:41:16 IPR RECORDATIONS ADDED IN APRIL 1993 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9300297	19930420	20020209	OMEGA STYLIZED	OMEGA FASHIONS, LTD.	Y
TMK9300298	19930420	20040410	OMEGA STYLIZED	OMEGA FASHIONS, LTD.	Y
TMK9300299	19930421	20021027	SUPERFONE STYLIZED	SAMHILL CORPORATION	Y
TMK9300300	19930423	20011013	JACCARD	JACCARD CORPORATION	N
TMK9300301	19930423	19990801	CHEAP AND CHIC BY MOSCHINO	MOONSHADOW S.P.A.	N
TMK9300302	19930423	20070303	MOSCHINO	MOONSHADOW S.P.A.	N
TMK9300303	19930423	20000814	MOSCHINO	MOONSHADOW S.P.A.	N
TMK9300304	19930423	20010528	MOSCHINO	MOONSHADOW S.P.A.	N
TMK9300305	19930423	20060107	MOSCHINO	MOONSHADOW S.P.A.	N
TMK9300306	19930428	20020616	BVLGARI	PARTECIPAZIONI BULGARI, S.P.A.	N
TMK9300307	19930428	20020414	BVLGARI	PARTECIPAZIONI BULGARI, S.P.A.	N
TMK9300308	19930428	20021013	LOCOMOTOR	LOCOMTOR U.S.A. INC.	Y
TMK9300309	19930428	20021027	LLAMA	LOCOMTOR U.S.A. INC.	Y
TMK9300310	19930428	20020307	STE. MICHELLE VINEYHARDS	STIMSON LANE LTD.	N
TMK9300311	19930428	20020929	NES	NINTENDO OF AMERICA INC.	N
TMK9300312	19930428	20020725	UFO	UFO CONTEMPORARY, INC.	Y
TMK9300313	19930428	20020725	UFO AND DESIGN	UFO CONTEMPORARY, INC.	Y
TMK9300314	19930430	20010903	ELBOW REEF	BENJAMIN SCOTT, INC.	Y
TMK9300315	19930430	20020623	HARLEY-DAVIDSON AN AMERICAN LEGEND LOGO	HARLEY-DAVIDSON, INC.	N
TMK9300316	19930430	19970614	C.H. OLIVER	HARTZ & CO., INC.	N
TMK9300317	19930430	20080202	OLIVER	HARTZ & CO., INC.	N
TMK9300318	19930430	20071271	HOMESTEAD STYLIZED	OLSON TECHNOLOGIES, INC.	N
TMK9300319	19930430	19960413	BIRKENSTOCK	BIRKENSTOCKK ORTHOPADIE GMBH	N

SUBTOTAL RECORDATION TYPE 70

TOTAL RECORDATIONS ADDED THIS MONTH 114

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 93–72)

MARUBENI AMERICA CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–04–00210

[For tariff classification purposes two door sports utility vehicle, derived from compact pick-up truck, with frame and rear suspension changes for passenger use, a single unit station wagon body and nonremovable rear seats, held to be motor vehicle primarily designed for transport of persons. Judgment for plaintiff.]

(Dated May 14, 1993)

Sharretts, Paley, Carter & Blauvelt, P.C. (Gail T. Cumins, Ned H. Marshak, Peter Jay Baskin and *Michele R. Markowitz)* for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Saul Davis, Carla Garcia-Benitez* and *Edith Sanchez Shea), Karen P. Binder,* Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court for decision following a trial *de novo.* The issue before the court is whether Model Year 1989 and 1990 two-wheel and four-wheel drive Nissan Pathfinders are properly classified under the Harmonized Tariff Schedule of the United States ("HTS"), heading 8704, "Motor vehicles for the transport of goods," or under heading 8703, "Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702 [public transport passenger vehicles]), including station wagons and racing cars." There is no dispute as to the placement of the merchandise under the appropriate subheadings. If defendant prevails, classification will remain under item 8704.31.00, HTS, based on weight. If plaintiff prevails, classification will be under item 8703.23.00, HTS, based on engine size.

BACKGROUND

The merchandise at issue is a two door multipurpose passenger vehicle ("MPV"), also known as a sports utility vehicle. The vehicle uses the same frame side rails as Nissan's "Hardbody" compact pick-up truck, and its front end is largely identical to the Hardbody's cab portion. The

Pathfinder, however, does not have a cargo box, which is the hallmark of any pick-up truck. Instead, its body consists of one unit and the inside is configured like an ordinary station wagon, with a rear seat or seats that fold down for extra cargo space. The Pathfinder would be a station wagon, except that it is designed for off-road use, whereas station wagons are designed for on-road use.

At this point, it may be appropriate to mention the Explanatory Notes to the Harmonized Commodity Description and Coding System, published by the Customs Co-Operation Council. The Pathfinder literally fits the Explanatory Note definition of a station wagon, which is a very broad definition.[1] The definition, however, likely would encompass some vans which are to be classified under heading 8704.[2] Most likely the station wagon definition was not meant to cover vans that do not have tailgates. A tailgate is one of the hallmarks of a "voiture du type "break"," which is the French term for "station wagon" as used in the Explanatory Note. Harmonized Commodity Description and Coding System, Heading No. 87.03 (1st ed. 1987). On the other hand, as indicated, traditional station wagons are not off-road vehicles. Thus, the Explanatory Note defining station wagons should not be read too literally. In any case, the note is not binding, although such notes are "generally indicative of proper interpretation of the various provisions of the [Harmonized Tariff System]." *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (quoting H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582). Also instructive, but nonbinding, is the decision of the Customs Co-Operation Council to classify the Pathfinder under heading 87.03. Report to the Customs Co-Operation Council on the Fifth Session of the Harmonized System Committee, Annex G/4 to Doc. 35.960E (HSC/5/Apr. 90) (G/4/2/Rev.) (Apr. 12, 1990); Report to the Customs Co-Operation Council on the Sixth Session of the Harmonized System Committee, Annex L/9 to Doc. 36.300E (HSC/6/Nov. 90) (Nov. 6, 1990). Excessive reliance on such a decision, however, may be in conflict with the court's duty to make *de novo* factual findings. The court deems it more useful to set aside these matters and to proceed to a factual assessment of the merchandise.

In exercising its factfinding function, the court does not rely on the classification of two Pathfinder models not before the court. One is the E-Model, a little sold, bare-bones vehicle with no back seat, which was classified under heading 8704, HTS, and the four door model which is classified under heading 8703, HTS. The classification of either of these vehicles may be in error and is subject to *de novo* challenge. *See Toyota*

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[1] "Station wagons" are defined as "vehicles with a maximum seating capacity of nine persons (including the driver), the interior of which may be used, without structural alteration, for the transport of both persons and goods." Customs Co-Operation Council, 4 Harmonized Commodity Description and Coding System, Explanatory Notes, Heading No. 87.03 (1st ed. 1986).

[2] An Explanatory Note of the Harmonized Commodity Description and Coding System indicates that heading 87.04 covers, in particular, "[o]rdinary lorries and vans (flat, tarpaulin-covered, closed, etc.); delivery trucks and vans of all kinds, removal vans * * *." 4 Harmonized Commodity Description and Coding System, Explanatory Notes, Heading No. 87.04.

Motor Sales, USA, Inc. v. United States, 7 CIT 178, 194–95, 585 F. Supp. 649, 662–63 (1984) (disparate treatment of similar merchandise is not controlling), *aff'd*, 3 Fed. Cir. (T) 93, 753 F.2d 1061 (1985). Accordingly, the court, for most purposes, excluded evidence on either vehicle. The court limited evidence to the vehicle models in the entries currently being considered, except for evidence providing a comparison with vehicles readily accepted as "trucks" or "passenger cars."

The trial in this matter occupied three weeks, including test drives, videotape viewing, document review and opening and closing arguments. Thus, it is impossible to discuss anything other than a few highlights of the evidence.

DISCUSSION

The issue in this case is whether the Pathfinder is principally designed for the transport of persons. Although defendant's classification of the Pathfinder as a vehicle for the transport of goods carries a presumption of correctness and plaintiff has the burden of proof, defendant's task was difficult from the outset. That is, one of the first steps was a viewing of a sample of the subject merchandise, which was available to the court throughout the trial. The sample virtually shouts to the consumer, "I am a car, not a truck."[3] Defendant's counsel, however, put on a good deal of evidence to show that certain segments of the automotive manufacturing industry, including persons within Nissan, view the subject merchandise as a "truck," at least for some purposes. *See. e.g.*, Defendant's Exhibit 131, at 48–49 (Deposition of J.P. Felix). Therefore, defendant's approach to the case, and probably the only sensible approach from its point of view, was to try to establish that the Pathfinder fits the common industry meaning of the term "truck." As trucks are by definition vehicles designed for the "transport of goods," classification under heading 8704, HTS, would follow.

Defendant went about its task in several ways. First, it emphasized all the similarities to the Hardbody compact pick-up truck and the dissimilarities to the Nissan Maxima, Nissan's top of the line sedan, which has the same size engine as the standard Pathfinder. The selection of the Nissan Maxima as the comparison vehicle was ostensibly made on an objective basis, after survey of the automotive market. Defendant's witness admitted, however, that he used numerous subjective and, to the court's mind, suspect criteria to select the Maxima.[4] Defendant's counsel's remark that the witness had to Nissan product to make a parts comparison is probably closer to the mark. In any case, it is clear that few Maxima parts are used in the Pathfinder, although there are numerous functional analogues. Apparently, there was no Nissan station wagon to use for comparison. The court doubts any other sedan would be more comparable, so from that standpoint the comparison is acceptable.

[3] Once again, the cliché that the "sample * * * is a very potent witness," *United States v. Halle Bros. Co.*, 20 CCPA 219, 221, C.A.D. 3552 (1932), appears true.

[4] For example, comparative engine size overpowered all other selection criteria, and "expensive" vehicles were excluded.

Overall, the court sees little use, however, in comparing the Pathfinder to a sedan, as opposed to a station wagon.

A. COMPARISON OF THE PATHFINDER AND THE HARDBODY PICK-UP TRUCK REVEALS SIGNIFICANT DIFFERENCES

1. *Numerous design changes were made to accommodate passengers in the Pathfinder:*

At trial, both parties embarked upon a comparison of the Hardbody and the Pathfinder. This is an area worth some consideration because the Pathfinder is a Hardbody derivative. The extent to which it differs from the Hardbody and the reasons for the differences are probative. The Hardbody is Nissan's compact pick-up truck. It has many features intended to give it passenger-car élan. It also has the open cargo box that is characteristic of a pick-up truck. Although the Hardbody is used principally as a general transportation vehicle, it is accepted as a "truck," albeit a compact pick-up truck with correspondingly inherent limits on cargo capacity.

Mr. Noguchi, Nissan's principal design engineer in the 1983 development period, testified that Nissan, a late entrant to the field, wanted to build an MPV to compete with the Ford Bronco II and similar vehicles. These vehicles have great flexibility, are suitable for people and cargo, travel through mud, snow, and other off-road terrain. The court would call these vehicles "compact" MPV's. This is in contrast to full size MPV's, which are not the subject of this action. Nissan's idea seemed to be to grab some portion of the compact pick-up truck market that might be switching to MPV's. It is not clear to what extent the designer foresaw that ordinary passenger car buyers would eventually switch to MPV's, but design documents indicate that this market was considered. Wanting to achieve this goal economically, and to avoid building a new plant, Mr. Noguchi decided to use as much of the Hardbody, which had some off-road capability, as possible. A decision was made to use the Hardbody frame side rails, which were expensive parts to manufacture.[5]

To keep the vehicle short, with appropriate departure angles for unlevel terrain, Mr. Noguchi designed a short rear bumper into which the frame was inserted. The Hardbody bumper was wider and outside the frame. Because of the rear passenger seats, the gas tank was moved to the rear and the spare tire position was changed. Of great concern to the designer was passenger ride, so a new rear suspension was developed. The court credits Mr. Noguchi's testimony that this was an expensive, innovative and important change. Instead of a typical truck leaf spring suspension, which has a different ride at different loads, a five link coil suspension was used. This and the change in the gas tank position led to

[5] There is a question as to whether the two-wheel drive Hardbody had weaker C-section side rails. Mr. Watanabe so testified, but documentary evidence implies the opposite. The court tends to believe Mr. Watanabe as he was a Hardbody designer. This is not particularly significant, however, as both the four-wheel drive Hardbody and the Pathfinder used stronger box-section side rails.

use of tubular cross beams, not present on the Hardbody frame, in the rear of the frame, and one more cross beam overall.

The factfinder rode in both a 1989 Pathfinder and a 1989 Hardbody. A significant difference in ride is discernible, even from the front seat, the only seat in the Hardbody model provided. The Hardbody ride is bumpier, that is, more "trucklike." Essentially, the same route was used and if differences in tires or shock absorber settings could account for this great difference, it was not part of the testimony in this case.

Other adjustments to the Hardbody design, ostensibly for passenger comfort, were noted. The court did not find front suspension differences of great significance. There seemed to be more significance to lowering the entire vehicle fifty millimeters for ease of entry. Likewise, improving the seat slide makes entry to the rear seat easier, although not as easy as entry into a sedan. Plaintiff's witnesses testified that the Hardbody door had already been widened and was adequate for this purpose. Also, the Pathfinder comes with a larger standard engine than the Hardbody. The Pathfinder engine is, in fact, the same size as the Maxima's, but there are differences from the Maxima engine because of the Pathfinder's various purposes. Plaintiff's witnesses testified that for performance reasons the larger engine was made a standard feature. The court believes there were numerous reasons for the engine change and they favor both sides. The other powertrain, axle and wheel differences are all minor, but are consistent with the Pathfinder's off-road mission, particularly in a loaded condition.

The main difference in the two vehicles is the overall body design. The Hardbody is a cab and cargo box, with virtually unlimited vertical space, unless capped. The Pathfinder has a station wagon body. This is a very important distinction. As Mr. Noguchi testified, the solid body dampens noise and protects against dust and wind. The body mounts are also different. The court credits Mr. Noguchi's testimony that these changes are for passenger comfort. Testimony of the intent of plaintiff's designer is probative, particularly when the intent appears to have been realized. *See Pistol Fashions, Ltd. v. United States*, 5 CIT 284, 286 (1983). Importantly, the station wagon body also provides space for a back seat. The roof was raised somewhat and leg room in the back seat is excellent – so excellent that with the back seats up for passengers, the Pathfinder's cargo space is *limited* compared to that of midsize station wagons.[6] Overall, rear seat area compares favorably with that of midsize wagons. *See* Plaintiff's Exhibit 62.

At this point, the court wishes to discuss defendant's exhibits 127 and 128. These are computer-designed models of the Pathfinder and Hardbody, which are superficially similar. The Hardbody model is equipped with a representation of an after-market cargo bed cap made to resemble the Pathfinder's rear window configuration. The Pathfinder model's rear seat and cargo area may be exposed in the model by

[6] The evidence revealed that midsize station wagons, rather than small or large ones, provide the best passenger-car cargo capacity comparisons.

lifting a cap-like portion of the model. One may not do this with an actual Pathfinder, without using a blow-torch.[7] For a better comparison of the exterior of the two vehicles, one should compare plaintiff's exhibits 1 and 2, which clearly show the different configurations between the vehicles as manufactured, including the clear divide between the cab and cargo box of the Hardbody.

The rear seat area is not an afterthought. By riding in the back seat, the factfinder was able to determine that the seats are comfortable; they also recline. Although the rear seats fold forward to make a fairly flat cargo bed, they are not removable. There are rear seat stereo outlets. There are ashtrays, cubbyholes, arm rests, handholds, footwells, seat belts, child seat tie down hooks, and operable windows. While none of these are basic structures, there is not much more which can be done to make a substantial rear seat area. Furthermore, no difference from passenger car rear seat areas was revealed. This is in contrast to side-facing flip-up seats in a king cab pick-up, which the factfinder was able to observe during a ride in a 1993 Ford Ranger compact pick-up; it is also in contrast to removable-type rear seats. Two medium sized attorneys were compressed into the king cab, which is obviously designed for short rides, probably for children. Some pick-up cabs also have full rear bench seats for "crews." These usually do not recline and witnesses for both sides testified the seats were not comfortable and also were only for short rides.

Overall, while the Hardbody and Pathfinder share some basic structural components, they were developed separately, and they were based on totally different concepts. Anyone who planned to buy one vehicle probably would not buy the other. The chassis is different, the body is different, and there is a substantial rear seat area which affects cargo space in the Pathfinder. Not insignificant is the great price difference between the simple cab and cargo box pick-up truck and the Pathfinder, a fairly expensive vehicle.[8]

2. *The Pathfinder's cargo carrying capability is inferior to the Hardbody's and compares well with that of station wagons:*

Cargo capacity data produced by both sides reveal that the Pathfinder's cargo capacity falls within the range of cargo capacities for midsize station wagons in rear seat-down configuration. Defendant produced some good regression analyses, which demonstrated that the Pathfinder lies outside the predicted line for station wagons when weight-driven (and to a lesser extent shadow area) factors are compared to cargo capacity. But the weight and shadow area of the Pathfinder are explained by its off-road capability. A visual examination of a Volvo 740 station wagon (a slightly longer vehicle) revealed the Volvo and Pathfinder to be functionally equivalent in this capacity. In terms of cargo

[7] Defendant's counsel took pains not to obscure this distinction.

[8] The court is glossing over trim level differences and differences between two- and four-wheel drive vehicles because they are not significant to the outcome. Most sales were of the four-wheel drive version, at the highest trim level. Stipulation of Facts, Attachment E.

capacity, they are remarkably similar in boxiness, overall size, rear opening, and configuration, even in the way in which the bottom of the rear seat pops up when the top folds down, which intrudes into the cargo space.[9] The Pathfinder's height from the ground may make it somewhat easier to load, but overall it does not differ significantly from a station wagon in terms of ease of loading or unloading. A depiction of the cargo areas of an earlier model of the same Volvo and the Pathfinder is found in plaintiff's exhibit 40. The court has also taken note of the cargo bed of the Hardbody, depicted in plaintiff's exhibit 42. It has no carpeting. It is uncovered and it has a supported fold down tailgate.[10]

The court notes at this point that whereas a pick-up may be loaded with an industrial fork lift, not so a Pathfinder because of its pop-up tailgate. A feature of the Pathfinder tailgate is a separate window opening to allow deposit of small packages, a passenger convenience rather than a true cargo feature. Furthermore, the Pathfinder's cargo area is quite plush not designed for moving dirty items without considerable packaging or use of a liner, whereas a pick-up can be easily washed out. As indicated previously, in the seat-up mode, the Pathfinder's cargo volume capacity is poor, although its 400 pound cargo weight capacity is not. Defendant also makes an argument that the Pathfinder's maximum capacity for persons (using a 150 pound standard), is 750 pounds, while its cargo carrying capacity (or payload) is 1,000 pounds. In terms of volume, maximum passenger space compares favorably with maximum cargo space. Furthermore, payload does not vary significantly from that of comparable station wagons.

B. The Pathfinder was Designed for Off-Road Passenger Use

The second of defendant's approaches was to challenge the testimony of plaintiff's witnesses that revealed that the off-road capability of the Pathfinder accounted for some of its similarity to a truck. Defendant's view is that the strength and weight of the Pathfinder is for cargo, and particularly cargo off-road. Important features that do not relate specifically to cargo are Pathfinder approach, departure and ramp over angles and ground clearance, all clearly for off-road use and superior to that of passenger vehicles. In fact, it is the Pathfinder's ground clearance, together with its stubbiness, which makes it look different from a passenger car or a capped pick-up truck.

Defendant's view is that the rear seat head clearance is less than that in the front seat and that a passenger of six feet or more would bump his or her head on serious off-road terrain. Thus defendant argued, strength and weight of the Pathfinder must be for off-road hauling of cargo, not people. First of all, there are seat belts; second, the seats recline; and third, one would imagine a six footer might switch to the front seat if he or she truly wishes to go bouncing over rough terrain. Also, it is

[9] Wheel houses intrude as well, but these were shortened from the Hardbody design to fit better into the rear seat area of the Pathfinder.

[10] Testimony was that the Hardbody bed is designed so that a hobbyist's four-by-eight plywood sheet will ride on the tailgate. The Pathfinder was not so designed; the flip-up gate does not travel well in the open position.

stipulated that the automotive designers designed for 150 pound people. It was not clear what height is considered the norm for this purpose, and 150 pounders would make somewhat thin six footers.[11]

Defendant also relies on evidence of low off-road usage. One of plaintiff's witnesses testified off-road use was about ten percent of usage. Maritz market studies show high *occasional* off-road usage, and little *frequent* off-road use, but it is not disputed that the vehicle is designed for the most stressful, use. The court has concluded that this is fully loaded off-road use. The Pathfinder cannot be sold as an off-road vehicle without practical off-road capability, even if many customers want off-road cachet more than off-road use.

Defendant also disputes that the Pathfinder's front end is actually designed for off-road passenger use. It put in evidence of the large truck-like front brake rotors and after-market snow plow features.[12] Snow plows do not come with the vehicles and the front end strength is consistent with winching the vehicle out of mud as well as winching tree stumps out of the ground. If one wishes to buy an expensive Pathfinder to do pick-up truck jobs one may, but it seems a waste of money, unless one wants superior passenger accommodations as well.

A good deal of testimony was devoted to towing. The Pathfinder has the weight, the strength and the engine to tow more than a station wagon of comparable size. The same factors are needed for good loaded off-road capability, and do not greatly influence the outcome.

C. The Level of Front Seat and Cab Comfort in Trucks is not Determinative

Defendant's third approach was to meet plaintiff's testimony regarding the Pathfinder's passenger amenities by demonstrating that various trucks were equally congenial. It produced a 1993 Ford Ranger compact truck, which rode slightly better than the Pathfinder and had numerous creature comforts. As the Ranger was right off the assembly line and compact pick-up trucks are used as substitutes for entry level passenger cars, this evidence was not surprising. That compact pick-up trucks are becoming very like passenger cars may someday call into question their classification, but it does not affect the classification of the Pathfinder. Similarly, that heavy trucks are often quite comfortable or have superior suspension systems, particularly at the high end, does not affect the classification of the merchandise at issue.

D. Marketing and Use Indicate the Pathfinder was Designed for Transport of Persons

The fourth area of concern was marketing, as reflective of design intent and execution. It is fairly clear from the evidence that cargo capacity was not a major objective of the designer vis-à-vis the competition, at least as reflected in its polar charts. *See. e.g.,* Plaintiff's Exhibit, Ref. No.

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[11] The 95th percentile American male, a six footer, was used for head room and leg room for some purposes. *See* Plaintiff's Exhibit, Ref. No. 3, Bates No. 1581.

[12] Pathfinders have front disc brakes rather than drum brakes, a more truck-like feature. Front leg room is also an improvement over the Hardbody.

17, Bates No. 23523. Product development documentation and advertising were consistent.[13] The emphasis was on family use, loading groceries and sports equipment and "go anywhere" élan.

This was quite a contrast with truck advertising, which overwhelmingly emphasized ruggedness and masculinity rather than family use. While marketing is not very important in this area because of the desire to portray the vehicle as "everything for everybody," marketing was much more passenger oriented than cargo oriented. This is also consistent with customer use information. Personal goods or business goods hauling was not a major concern.

E. Regulatory Schemes and Industry Terminology that Classify Sports Utility Vehicles as a Subcategory of Trucks do not Control Tariff Classification

The fifth and strongest area for defendant is definitional. Throughout Nissan's documents and advertising, the Pathfinder is schizophrenically referred to as a "truck" and a "car."[14] Apparently, Nissan is not alone in this regard. The automotive industry was once clearly divided into cars and trucks. Sports utility vehicles employing truck-like frames[15] are often made in separate truck divisions and are included in pick-up truck/sports utility vehicle sales line-ups. In fact, the Pathfinder and the Hardbody share an owners' manual. From a basic structural engineering viewpoint, one might, without dissembling, call the Pathfinder a "truck." Ford and Chrysler's engineers reflected this view. This does not make the Pathfinder a "truck," nor does it mean that the Pathfinder is not principally designed for carrying people. The classification is not controlled by the fact that certain basic structures are suitable for trucks. As indicated, there were some basic structural changes and numerous other design points which were all for the purpose of accommodating passengers. While the latter changes may seem minor to engineers, they are part of the total design of the vehicle. In fact, one of defendant's engineers, when asked, could not think of how to make a sports utility vehicle which would be more suitable for passenger use.[16] Another said he would add some more hand holds – hardly a major change.

This engineering view of life, which is keeping the automotive world uncomfortably divided into car and truck hemispheres, is also reflected in classifications from the Society of Automotive Engineering ("SAE"), National Highway Traffic Safety Administration ("NHTSA") and the Environmental Protection Agency ("EPA"). MPV's are treated separately from passenger cars and often are a subcategory of "trucks." The fact is that MPV's are different from what are ordinarily considered pas-

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[13] The marketing and product planning documents mention cargo capacity. It does not appear to be a high priority. *See* Plaintiff's Exhibit, Ref. No. 22, at Bates Nos. 5200–20.

[14] The Japanese word for "car" has a broad meaning, but in discussing the Pathfinder Nissan also used the word "wagon" or referred to passenger or sports car use.

[15] A few passenger cars use body-on-frame construction; most use unibody construction. Likewise, a few trucks and one MPV use unibody construction.

[16] He indicated that he might investigate whether the chassis was unnecessarily strong.

senger cars because of off-road capability, and also from trucks, which are often defined as vehicles primarily designed for the transport of property.

That Nissan took advantage of legal NHTSA and EPA classifications to avoid certain "passenger car" requirements does not alter the outcome of this tariff case. Safety, in particular, is a matter of degree. That some safety features were not included does not weigh heavily in the classification analysis. The Pathfinder does not have to be a "passenger car" as defined by SAE, EPA or NHTSA in order to be principally designed for carrying people. MPV's are *multipurpose passenger vehicles* as opposed to *on-road passenger cars*. The definitions and classifications of NHTSA, EPA and similar organizations are not intended to control customs classification. *See International Spring Mfg. Co. v. United States*, 85 Cust. Ct. 5, 8, C.D. 4862, 496 F. Supp. 279, 282 (1980), *aff'd*, 68 CCPA 13, C.A.D. 1257, 641 F.2d 875 (1981). It would also be incongruous if such regulations did cause MPV's to be classified as "trucks," as MPV's will soon be required to meet many "passenger car" standards. These are questions and cannot be disposed of together.

In sum, the court has little doubt that the Pathfinder is *principally* designed for the transport of persons. Goods carrying capacity and special purpose uses clearly total less than fifty percent of design intent and execution.[17] Accordingly, the merchandise at issue shall be classified under item 8703.23.00, HTS. Any excess duties paid shall be refunded with interest as provided by law.

(Slip Op. 93–73)

FORMER EMPLOYEES OF FINA OIL & CHEMICAL CO., PLAINTIFFS *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 89–07–00410

[Vacation of Judgment of Dismissal in Court No. 89–07–00410 vacated.]

(Dated May 17, 1993)

Paul T. Duncan, pro se for plaintiffs.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(Cynthia B. Schultz), Scott Glabman*, U.S. Department of Labor, of counsel, for defendant.

ORDER

GOLDBERG, *Judge:* IT IS HEREBY ORDERED THAT that portion of the court's Order in *Former Employees of Fina Oil & Chemical Co. v. United States Secretary of Labor*, No. 93–66 (CIT May 3, 1993) vacating the judgment of dismissal issued in Court No. 89–07–00410 is vacated. The judgment of dismissal in Court No. 89–07–00410 is reinstated.

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[17] The court accepts defendant's premise that if the Pathfinder were designed fifty percent for passenger use and fifty percent for cargo or special purposes, it would not be classified under heading 8703, HTS.

(Slip Op. 93–74)

INDUSTRIAL QUIMICA DEL NALON, S.A., AS SUCCESSOR TO ASTURQUIMICA, S.A., PLAINTIFF *v.* UNITED STATES, C. WILLIAM VERITY, SECRETARY OF COMMERCE, JAN MARES, DEPUTY ASSISTANT SECRETARY FOR IMPORT ADMINISTRATION, AND WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, DEFENDANTS

Court No. 88–07–00492

[This matter was remanded to the ITA so that Plaintiff would have the opportunity to document claimed adjustments for technical services. The ITA again concluded that plaintiff had not submitted enough proof regarding those claims. *Held:* The ITA remand results are accepted.]

(Decided May 17, 1993)

Kaplan, Russin and Vecchi (Dennis James, Jr. and *Kathleen F. Patterson)* for plaintiff.
Whitman & Ransom (Dennis James, Jr. and *Kathleen F. Patterson)* for plaintiff.
Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(Jane E. Meehan), (Dianne McDevitt,* Attorney-Advisor, U.S. Department of Commerce, Of Counsel) for defendants.

OPINION

MUSGRAVE, *Judge:* On June 8, 1992, defendant in the above-captioned matter filed its "Result of Redetermination Pursuant To Court Remand," *Industrial Quimica del Nalon v. United States,* ____ CIT ____, Slip Op. 92–17 (CIT February 28, 1992)." In accordance with the Court's order, The Department of Commerce, International Trade Administration ("Commerce" "Department" or "ITA") reopened the record and allowed Industrial Quimica del Nalon ("IQN") to submit information not previously on the record to substantiate its claim for technical service expenses incurred in support of home market sales of potassium permanganate. In its redetermination, Commerce concluded that IQN was still unable to substantiate its claim that two technicians spent 100 percent and 50 percent of their time, respectively, in rendering technical services. Accordingly, Commerce denied once again the salary portion of IQN's claimed technical services adjustment.

On June 19, 1992, plaintiff wrote the Court to express its disagreement with the remand results but also to advise the Court that it could not expend further resources on the matter. Plaintiff stated that it would not oppose further remand and restated by incorporation its position on the salary adjustment set out in plaintiff's prior filing, "Comments on Remand Results" filed with the Court on September 23, 1991.

In the "Comments on Remand Results" filed with the Court on September 23, 1991, IQN contended that the ITA's denial of an adjustment for the technicians' salaries was unreasonable and not supported by substantial evidence on the record. To the contrary, IQN argued that the ITA staff conducted extensive interviews with the two technicians

and asked for select documents, not all of them. IQN argued that the mere fact that no single document or compilation of documents reflect "percentages" of time worked in areas that qualify for adjustment was no reasonable basis to reject *in toto* the existing evidence that one technician spent the bulk of his time in support of home market sales and that the other spent approximately half his time, or at least a meaningful amount, in support of home market sales. "Despite the Court's recognition that a company using its very best efforts may not be able to provide perfect written documentation, ITA still continues to find the evidence on the record, (which consists of the above-mentioned affidavits by the technicians and selected trip reports) insufficient. *Plaintiffs Comments on Remand Results of September 10, 1991 Redetermination based on Industrial Quimica del Nalon v. United States,* ____ CIT ____, Slip Op. 91–43 (CIT May 24, 1991) at 9. Plaintiff was referring to the Court's comment that "Commerce's desire to obtain documentation should not fly in the face of established business practice, and should not be transformed into a do-or-die requirement." *Industrial Quimica del Nalon v. United States,* Slip Op. 91–43 at 5–6. The Court subsequently ordered the ITA to accept and consider additional information provided by IQN that had been rejected regarding the technical services. *See Industrial Quimica del Nalon v. United States,* Slip Op. 92–17 (CIT February 28, 1992).

In addition to the dispute over what was required to meet plaintiff's burden of proof and whether less than total proof of the time spent claimed (respectively 100 percent and 50 percent) justified a total denial of all salary deductions for those services, IQN argued that the portion, if any, of the technicians services that was deemed "good will," and therefore not qualified for a salary deduction, was clearly deductible as a circumstance of sale adjustment under Title 19 C.F.R. § 353.15(b) (1986).

The Court will first address the issue of the sufficiency of the existing documentation. "This Court ordered that 'ITA shall grant an adjustment for technical service expenses incurred by Industrial Quimica Del Nalon (IQN) in support of home market sales of potassium permanganate (PP), *provided IQN can document* that the two technicians performed such services one hundred percent and fifty percent of the time, respectively.'" *Slip Op. 92–17 citing Amended Order, dated June 12, 1991, at 1 (emphasis added in Slip Op. 92–17).*

In denying an adjustment for technicians' salaries, the ITA found that "the evidence on the record indicates that a meaningful, but, indeterminate amount of the technicians' time and services was directed toward goodwill and future sales." *Remand Results of September 10, 1991 at 2* (relying on *Rhone-Poulenc v. United States,* 592 F. Supp. 1318 (CIT 1984)). Both job descriptions and the two worker's ITA staff verification interviews indicate that two technicians were hired to and in fact did spend *some* time with Spanish wholesale customers of IQN, explaining to those wholesalers and those wholesalers' customers the benefits of

IQN's product, potassium permanganate. IQN characterized the services as technical assistance. The ITA characterized the services to IQN's customers' customers as "good will," suited to advertising rather that technical services. However, the ITA's rationale for its characterization, relying on *Rhone-Poulenc,* was refuted in Slip Op. 91–43 at 4.

Pursuant to the latest remand,[1] plaintiff entered affidavits from the two workers. *See Plaintiff's Submission of Additional Documentation of July 22, 1991 (Attachment I).* One worked "about half the time" (English translation) providing technical assistance according to his affidavit. The other provided "technical assistance to customers of Asturquimica." (English translation). "Part of the assistance was given to customers or potential customers among the wholesale customers * * *" of IQN. The Court may presume that this second worker is the employee for whom IQN claimed 100 percent of the salary adjustment. *See general id.*

Despite the affidavits and the previously submitted evidence from the staff interviews and trip reports, the ITA remained adamant in its view that not enough evidence had been offered for it to discern what amount of time had been spent on "good will" and what time had been spent on technical services. Therefore, in barely four pages of analysis, the ITA again denied the salary portion of IQN's claimed technical services adjustment.

The Court has noted that affidavits are suitable where business documents substantiating the claim are not likely to exist or are not readily available. Slip Op. 91–43 at 6 (CIT May 24, 1991). Although the affidavits do represent that all and half of the time for the two workers respectively was spent on technical services, that claim is at least somewhat rebutted by the job descriptions and the staff interviews.

Whereas the government has shown some intransigence with respect to the Court's prior opinions in this matter, the Court is wary of stepping into the shoes of the ITA verification team to determine what those workers actually did. The Court is equally wary of stepping into the shoes of IQN's litigators, now that those litigators have been withdrawn for lack of funds, with regard to IQN's other contentions.

Therefore, upon due consideration and with some reluctancy, the Court accepts the ITA's conclusion in its June 8, 1992 "Results of Redetermination Pursuant to Court Remand," *Industrial Quimica Del Nalon v. United States,* Slip Op. 92–17 (CIT February 28, 1992), to deny the salary portion for IQN's claimed technical services adjustment. This matter is hereby dismissed.

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[1] The Court remanded the Department determination in the 1986 Administrative review of potassium permanganate from Spain and provided that respondent "IQN shall have sixty days from the date of this order to submit any information it wants ITA to consider in determining the technical services adjustment." *See* Order accompanying Slip Op. 92–17.

(Slip Op. 93–75)

GROUP ITALGLASS U.S.A., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 91–09–00677

(Dated May 14, 1993)

ORDER

NEWMAN, *Senior Judge:* Upon consideration of plaintiff's motion for reconsideration of the court's opinion and interlocutory order of March 29, 1993, Slip Op. 93–46, granting in part plaintiff's motion for summary judgment, defendant's response thereto, and all other proceedings had herein, plaintiff's motion is granted to the extent that the interlocutory order denying summary judgment is amended to include a statement in conformity with 28 U.S.C. § 1292(d)(1): "A controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and an immediate appeal from that order may materially advance the ultimate termination of the litigation."

Further ORDERED that the following question is hereby certified to the United States Court of Appeals for the Federal Circuit pursuant to section 1292(d)(1): Whether the Court of International Trade was correct in its interpretation of heading 7010 of the Harmonized Tariff Schedule of the United States. Further proceedings in this action in the United States Court of International Trade shall be stayed pending any interlocutory appeal pursuant to section 1292(d)(1).

(Slip Op. 93–76)

MITA COPYSTAR CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–05–00260

[Defendant's Motion for Summary Judgment granted. Plaintiff's Cross-Motion for Summary Judgment denied. Action dismissed.]

(Dated May 20, 1993)

Grunfeld, Desiderio, Lebowitz & Silverman, (Steven P. Florsheim), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Barbara M. Epstein)* for defendant.

Neville, Peterson & Williams, (John M. Peterson and *Peter J. Allen),* for Amicus Curiae Xerox Corporation.

MEMORANDUM OPINION

GOLDBERG, *Judge:* This action comes before this court on (defendant's Motion for Summary Judgment and plaintiff's Cross-Motion for

Summary Judgment. The court grants defendant's motion, denies plaintiff's cross-motion, and hereby dismisses the action.

BACKGROUND

Plaintiff is the importer of toners and developers used for electro-photographic copy machines. The merchandise at issue was exported from Japan and entered the United States in March and April, 1989. The subject merchandise was classified by the United States Customs Service ("Customs") under the Harmonized Tariff Schedule of the United States ("HTSUS") subheading 3707.90.30, which encompasses "[c]hemical preparations for photographic uses." The merchandise was assessed with a duty rate of 8.5 percent *ad valorem*.

Plaintiff claims that the proper classification was HTSUS subheading 3707.90.60 which includes "[u]nmixed products for photographic uses, put up in measured portions or put up for retail sale in a form ready for use" and is dutiable at a rate of 1.5 percent *ad valorem*.

Plaintiff filed timely protests, which were denied by Customs in December 1989 and March, 1990. Plaintiff then filed a complaint before this court.

In July, 1992, defendant filed its motion for summary judgment asserting that Customs properly classified the subject merchandise, and that no genuine material issues of fact remain in dispute. Plaintiff filed a cross-motion for summary judgment, and argued that no issues of fact exist since the merchandise is appropriately classified under HTSUS subheading 3707.90.60. The Xerox Corporation submitted an Amicus Curiae brief in support of plaintiff's position.

DISCUSSION

A. *Nature of the Merchandise:*

All parties agree regarding the underlying factual predicate of the case. The parties concede that the merchandise in question, toners and developers used in Mita Copystar photocopy machines, impart an image upon the copy produced by the photocopy machine. The parties also agree that "[e]ach of the imported toners and developers contain two or more chemical elements and/or compounds." Defendant's Brief in Support of its Motion for Summary Judgment ("Defendant's Brief") Exhibit G, Plaintiff's Response to Defendant's First Request for Admissions, at Admission Response 2 and Confidential Attachment A to Defendant's Brief.

Specifically, the subject toner is comprised of two resins[1], carbon black[2], dye, and silica and/or aluminum oxide. *See* Confidential Attachment A to Defendant's Brief. Plaintiff presented evidence which showed

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[1] The evidence demonstrated that the raw material from which resin is formed is petroleum.

[2] The evidence showed that carbon black is manufactured through atomization of evaporating petroleum. Further, in place of carbon black, pigments may be utilized for blue or red colors.

that in manufacturing toner, the resins, carbon black, and dye are mixed together, heated and kneaded. The molten product is extruded in a thin sheet, and cooled to a solid. The solid sheet is next pulverized into a powder, which is classified to achieve the correct particle size required for the product. Silica and/or aluminum oxide is added, which serves as a flow agent and adjusts electrical charge of the toner. *See* Plaintiff's Memorandum in Support of its Cross-Motion for Summary Judgment and In Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Brief") at 4.

Developer, on the other hand, consists of "carrier," which is a combination of metal oxides. *See* Confidential Attachment A to Defendant's Brief. Measured amounts of carrier are subjected to wet pulverization, and then dried into particles. The product is next burned, and pulverized into a powder. The powder is then classified to achieve the correct particle size, and finally a limited amount of toner is added. *See* Plaintiff's Brief at 4–5.

The evidence further demonstrated that when used in photocopying, developer is positioned in the developing unit of the copier, and toner is placed in the toner reservoir. During operation of the copier, toner automatically enters the developing unit, where it is continuously mixed with carrier to a pre-determined ratio. As toner is exhausted, the developing unit is supplied with additional toner. The carrier portion of the developer is not consumed during the process. Instead, carrier simply conveys toner to the photoreceptor, and then to the paper copy being made. Carrier remains in the developing unit, and is re-mixed with fresh toner. *See* Plaintiff's Brief at 3–5.

In the case at bar, toners and developers are constituents of a "two component" electrophotographic process. A competing process, entitled a "one component" system, utilizes only a single product called a monocomponent toner. In a one component system, toner need not be mixed with developer in the photocopy machine.

Finally, the evidence showed that toners and developers are designed specifically for use in one type or brand of machine, and are not interchangeable between machines. *See* Plaintiff's Brief at 3. The individuality of toners and developers is attained in part through the nature and quantities of the ingredients used in their preparation.

B. *Classification of the Merchandise:*

Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show, that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(d).

In the case at bar, the parties agree that the merchandise is properly classified only under either HTSUS subheading 3707.90.30 or 3707.90.60.

The HTSUS heading in dispute states in full:

3707	Chemical preparations for photographic uses (other than varnishes, glues, adhesives and similar preparations); unmixed products for photographic uses, put up in measured portions or put up for retail sale in a form ready for use:
3707.10.00	Sensitized emulsions .....
3707.90	Other:
3707.90.30	Chemical preparations for photographic uses .....
3707.90.60	Unmixed products for photographic uses, put up in measured portions or put up for retail sale in a form ready for use.

The Harmonized Commodity Description and Coding System Explanatory Note (1986) ("Explanatory Note" or "Note") which is the Customs Cooperation Council's official interpretation of the Harmonized system ("HS"), states in reference to 3707.90 that:

> 3707.90 – **Other**
>
> Subject to the conditions specified at (A) and (B) below, this heading covers products of a kind used directly in the production of photographic images. Such products include:
>
> * * * * * * *
>
> (2) **Developers** to render latent photographic images visible * * *.
>
> * * * * * * *
>
> (5) **Toners** to modify the colour of the image * * *.
>
> * * * * * * *
>
> All the products cited above fall within the heading only when they are:
>
> (A) Single substances which are:
>
> (i) Put up in measured portions, that is uniformly divided up into the quantities in which they will be used, e.g., tablets, small envelopes put up containing the measured amount of powder for one developing bath; or
>
> (ii) In packings for retail sale and put up with any indication that they are ready for use in photography, whether by label, literature or otherwise (e.g. instructions for use, etc.).
>
> Single substances put up other than as above, are classified according to their nature (e.g. as chemical products in Chapter 28 or 29, as metallic powders in Section XV, etc.).
>
> or
>
> (B) Preparations obtained by mixing or compounding together two or more substances for photographic use. Such preparations remain within the heading whether put up in

bulk or small quantities, and whether or not presented for retail sale.

Explanatory Note 37.07.

Defendant argues that based upon the Explanatory Notes, lexicographic sources, and expert witness evidence, HTSUS subheading 3707.90.60 comprises only those products which are elements or chemical compounds.[3]

Defendant asserts that products such as developers or toners are neither elements nor chemical compounds. Rather, they are chemical mixtures because "the amount of each element or compound [which comprise them] may be present in any proportion, dependent upon the desire of the person making the mixture * * * the ingredients are electively determined, and thus do not have a 'fixed ratio' to one another." Defendant's Brief at 9–10 (citations and footnotes omitted). Defendant concludes that mixtures, such as developer and toner, are classified under HTSUS subheading 3707.90.30 as chemical preparations.

Plaintiff opposes defendant's classification essentially on the grounds that Customs interpreted the applicable tariff terms too narrowly. Plaintiff contends that even if the subject merchandise is described by the "chemical preparation" subheading, it is more specifically provided for under HTSUS subheading 3707.90.60 as an "unmixed product."

Plaintiff argues that lexicographic sources hold that the common meaning of the term "unmixed products" embraces photochemicals which do "*not* combine the characteristics of two or more classes or kinds, or [products which] conform[ ] to a single type." Plaintiff's Brief at 9. Developers and toners are such unmixed products because they each are known by a distinct name and each serves a specific function. Moreover, as opposed to monocomponent toner which exemplifies a chemical preparation under the HTSUS, the subject merchandise does not combine classes or kinds of products. The subject developer and toner become a chemical preparation only after mixing during photocopying.

Plaintiff also claims that the Explanatory Notes are not definitive. It contends that the Notes are appended to the international version of the HS, which contains only subheading 3707.90, and is not further divided into subheadings 3707.90.30 and 3707.90.60. Therefore, even though Explanatory Note 3707.90 contains a two part description, it does little to illuminate the HTSUS subheadings under review.

Further, plaintiff asserts that the Explanatory Notes actually show that developers or toners are considered single substances, and hence

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[3] Defendant defines element as: "[a] 'substance which cannot be decomposed by ordinary chemical methods into simpler substances, e.g. oxygen.'" Defendant's Brief at 9 (quoting *Concise Chemical and Technical Dictionary)* (2d ed. 1962). The court also notes that the *Concise Chemical and Technical Dictionary* 480 (4th enlarged ed. 1986) describes element as: "[m]atter, all of whose atoms are alike in having the same positive charge on the nucleus and the same number of electrons."

Defendant further defines a compound as: "'[a] substance composed of atoms or ions of two or more elements in chemical combination * * * [sic] A compound, a homogeneous entity where the elements have definite proportions by weight and are represented by a chemical formula. A compound has characteristic properties quite different from those of its constituent elements * * *'." Defendant's Brief at 9, (quoting *Hawley's Condensed Chemical Dictionary* 302 (11th ed. 1987).)

classifiable as unmixed products. Plaintiff argues that, for example, *plaintiff* is unaware of any developers, as specified in the Explanatory Note, "put up [in small envelopes] containing the measured amount of powder for one developing bath" which contain only a single element or compound. Explanatory Note 3707.90 (A)(i). *See* Plaintiff's Brief at 15. Consequently, the HS is premised upon the tenet that all developers put up in this form are mixtures of chemicals. It is implicit, therefore, in the HS that certain developers which are in fact chemical mixtures are single substances, and accordingly unmixed products.

Finally, plaintiff claims that pursuant to other provisions of the HTSUS, the term "unmixed products" includes chemical mixtures.

The court notes at the outset that pursuant to 28 U.S.C. § 2639(a)(1) (1988), it is well settled that Customs' classification is presumed correct, and the burden of proof is upon the party challenging the classification. *Jarvis Clark Co. v. United States,* 2 Fed. Cir. (T) 70, 72, 733 F.2d 873 (1984) *reh'g denied,* 2 Fed. Cir. (T) 97, 739 F.2d 628 (1984).

The meaning of a tariff term is a question of law. *Digital Equip. Corp. v. United States,* 8 Fed. Cir. (T) ____, 889 F.2d 267, 268 (1989). Moreover, when a tariff term is not defined in either the HTSUS or its legislative history, the correct meaning of a term in a tariff provision is the common meaning understood in trade or commerce. *Schott Optical Glass, Inc. v. United States,* 67 CCPA 32, 612 F.2d 1283 (1979). Finally, a court may rely upon its own understanding of terms used, and may consult standard lexicographic and scientific authorities, to determine the common meaning of a tariff term. *Trans-Atlantic Co. v. United States,* 60 CCPA 100, 471 F.2d 1397 (1973).

The court first examines the relevance of the Explanatory Notes. In doing so, the court recognizes that Explanatory Notes do not constitute controlling legislative history. *Pfaff American Sales Corp. v. United States,* 16 CIT ____, No. 92–226 (CIT Dec. 18, 1992). Rather, their purpose is to significantly clarify the reach of HTSUS subheadings, and to offer guidance in interpreting its subheadings. *Ugg Int'l, Inc. v. United States,* 17 CIT ____, 813 F. Supp. 848, 853 (1993).

The court finds that although Explanatory Note 3707.90 pertains to HTSUS 3707.90 in general, the distinction in the Explanatory Note between single substances and mixed or compounded preparations closely tracks the division in the HTSUS between 3707.90.30 and 3707.90.60. Accordingly, this portion of the Explanatory Note sheds significant light on the interpretation of HTSUS subheadings 3707.90.30 and 3707.90.60.

It is clear from the Explanatory Note that developer and toner are expressly listed as separate "products" under subheading 3707.90. Further, products qualify for classification under 3707.90 only when they are composed of either a single substance *or* a preparation obtained by mixing or compounding together two or more substances. On its face, therefore, the Explanatory Note envisioned that each "product"—be it toner, developer, or other—can be composed of a single substance *or* a

mixture of substances. Accordingly, plaintiff's argument is facially inaccurate that implicit in the HS is the premise that products such as developers are classified as single substances even though they are in fact chemical mixtures.

Based on the Explanatory Notes, therefore, the court finds that under the HTSUS, developers and toners may consist of a single substance and be an unmixed product, or they may be a chemical preparation. Consequently, the court must next determine the definition of these terms.

Defendant argues that the term "single substance," and correspondingly the term "unmixed products," must be interpreted narrowly to encompass only those products composed of single chemical elements or chemical compounds. Plaintiff, on the other hand, asserts that the terms should be interpreted broadly so that merchandise which does "not combine the characteristics of two or more **classes of products**" is an unmixed product. Plaintiff's Brief at 9.

Plaintiff bases its expansive interpretation of the tariff terms upon the theory that other sections of the HTSUS modify the meaning of the tariff terms at issue. Plaintiff asserts that the Explanatory Note prefacing HS Chapter 30, Chapter Note 2(a), provides a list of "unmixed products" which expressly encompasses chemical mixtures.[4] Plaintiff claims that pursuant to *Productol Chemical Co. v. United States*, 74 Cust. Ct. 138 (1975), phrases must be given the same interpretation when the same term is used in two sections of the HTSUS. However, *Productol Chemical Co.*, 74 Cust. Ct. at 151, provides only that:

> where the same word or phrase is used in different parts of the same statute, it will be presumed, *in the absence of any clear indication of a contrary intent, to be used in the same sense throughout the statute.* (Citations omitted) (emphasis added).

The court finds that the Explanatory Notes, lexicographic and scientific resources, and evidence submitted in conjunction the parties' summary judgment motions provide a "clear indication" of the intended meaning of subheading 3707.90.30, and 3707.90.60.

The court first examines, as it may, lexicographic and scientific authorities to determine the common meaning of the tariff terms. *See Trans-Atlantic Co.*, 60 CCPA at 100.

Webster's Third New International Dictionary Unabridged 2504 (1986) describes "unmixed" as meaning: "not mixed : unadulterated, pure * * *." *The Random House College Dictionary* 856 (revised ed.

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[4] The Explanatory Note provides in relevant part:

Chapter 30

PHARMACEUTICAL PRODUCTS

Chapter Notes.

* * * * * * *

2. For the purposes of headings Nos. 30.03 and 30.04 and of Note 3(d) to this Chapter, the following are to be treated:

(a) As unmixed products:

(1) Unmixed products dissolved in water;
(2) All goods of Chapter 28 or 29: and
(3) Simple vegetable extracts of heading No. 13.20, merely standardised or dissolved in any solvent; * * *.

1988) defines "mixed" Composed of or containing different kinds of persons, materials, elements, etc." *The Oxford English Dictionary* Vol. IX 916 (2d ed. 1989) explains "mixed" as: "2.a. Mingled or blended together; formed by the mingling of different *substances,* individuals, etc." (Emphasis added.)

The term "substance" is defined by *Hawley's Condensed Chemical Dictionary* 1102 (11th ed. 1987) as: "Any chemical element or compound. All substances are characterized by a unique and identical constitution and are thus homogeneous." *Webster's Third New International Dictionary* Unabridged 2279 (1986) described "substance" as: "4. * * * c: matter of definite or known chemical composition : an identifiable chemical element, compound, or mixture – sometimes restricted to compounds and elements * * *."

The court notes that Explanatory Note 3707.90 limits its description to *single* substances. Consequently, the court finds that the common meaning of the term "single substance" as provided in the Explanatory Notes is matter composed of an identifiable chemical element or compound. Further, based upon the Explanatory Notes and available lexicographic and scientific resources, the court determines that products properly classifiable under HTSUS subheading 3707.90.60 as "unmixed products" are only those composed of an element or a chemical compound.

The court also examines the meaning of the tariff term "chemical preparation" in HTSUS subheading 3707.90.30. Standard lexicographic authorities provide a general definition of the term "chemical preparation." *Webster's Third New International Dictionary* Unabridged 1790 (1986) defines "preparation" as "5 : something that is prepared : something made, equipped, or compounded for a specific purpose * * *." *Funk & Wagnalls New Standard Dictionary of the English Language* 1957 (1942) defines the term as: "4. [s]omething made or prepared, especially a compound, concoction, or composition; as, medicinal or chemical *preparations*."

Explanatory Note 3707.90(B) provides that products are classifiable as a chemical preparation when they are "preparations obtained by mixing or compounding together two or more substances for photographic use." (Emphasis added.) Thomas Governo, a New York Branch Chief of the Chemical Branch of Customs, testified in an affidavit submitted with Defendant's Brief that "[m]y understanding of the term 'chemical preparation' is that a preparation is a mixture of two or more elements or compounds compounded specifically for an end use." Thomas Governo affidavit submitted with Defendant's Brief at 2, paragraph 9.

Based on the evidence before the court, the court finds that products which are combinations of two or more elements or chemical compounds are chemical preparations, and are correctly classified under HTSUS subheading 3707.90.30.

In the case at bar, uncontradicted evidence shows that the subject merchandise is not composed of only an element or of a chemical com-

pound. *See* Defendant's Brief Exhibit G, Plaintiff's Response to Defendant's First Request for Admissions, at Admission Response 2. Instead, the evidence demonstrates that the subject toners and developers are combinations of elements and chemical compounds, and are therefore chemical preparations. *See Id.*

Finally, the court finds that because the evidence shows that the definitions of the tariff terms "unmixed products" and "chemical preparations" are mutually exclusive, both provisions do not describe the same merchandise. Consequently, the court need not address plaintiff's argument that even if the subject merchandise is described by the "chemical preparation" subheading, it is more specifically provided for under HTSUS subheading 3707.90.60 as an "unmixed product." Plaintiff had contended that, pursuant to HTSUS General Rule of Interpretation 3(a), when two provisions control the same product, the more specific description – in this case, subheading 3707.90.60 – prevails. However, in order for HTSUS General Rule of Interpretation 3(a) to apply, the merchandise must be clearly and equally described by two competing provisions, which is not the case at bar. *E.M. Chemicals v. United States*, 9 Fed. Cir. (T) ___, 920 F.2d 910 (1990).

Accordingly, the court concludes that no genuine issues of fact remain, and that the subject toners and developers are properly classified as chemical preparations under HTSUS subheading 3707.90.30.

CONCLUSION

For the reasons provided above, this court holds that no genuine issues of fact regarding the classification of the subject merchandise remain in this action. Accordingly, defendant's motion for summary judgment is granted, plaintiff's cross-motion for summary judgment is denied, and the action is dismissed.

(Slip Op. 93–77)

SUGIYAMA CHAIN CO., LTD., I&OC OF JAPAN CO., LTD., AND HKK CHAIN CORP. OF AMERICA, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 90–11–00605

(Dated May 19, 1993)

JUDGMENT

CARMAN, *Judge:* This case having been remanded to the Department of Commerce, International Trade Administration ("ITA"), pursuant to this Court's decision, Slip Op. 92–98 (June 30, 1992), the remand results having been filed with the Court on October 16, 1992, and this Court having received Plaintiffs' comments on the remand results, it is hereby

ORDERED that the remand results filed with this Court on October 16, 1992 are hereby affirmed; and it is further

ORDERED that the ITA shall publish a revised final results of administrative review for the periods April 1, 1987–March 31, 1988 and April 1, 1988–March 31, 1989 for the following two Sugiyama Chain distribution channels:

Period	Manufacturer/Exporter	Weighted average dumping margin (percent)
April 1, 1987–March 31, 1988	Sugiyama/I&OC	.19
April 1, 1987–March 31, 1988	Sugiyama/Hokoku/HKK	1.15
April 1, 1988–March 31, 1989	Sugiyama/I&OC	.37
April 1, 1988–March 31, 1989	Sugiyama/Hokoku/HKK	.30

And it is further

ORDERED that this case is dismissed

(Slip Op. 93–78)

PHIBRO ENERGY, INC., ET AL., PLAINTIFFS *v.*
BARBARA H. FRANKLIN, ET AL., DEFENDANTS

Court No. 92–06–00394

[Plaintiffs' motion for judgment upon the agency record is denied.]

(Dated May 21, 1993)

Williams & Connolly (John G. Kester and *David D. Aufhauser)*, for plaintiffs.

Stuart E. Schiffer, Assistant Attorney General of the United States; *Joseph L. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Mark S. Sochaczewsky); Robert J. Heilfertz*, Attorney-Advisor, Office of Chief Counsel for Import Administration, United States Department of Commerce, for defendants United States, et al.

Bracewell & Patterson (Scott H. Segal and *Gene E. Godley)* and *S. Lee Wingate* (Counsel to the City of Texas City), of counsel, for Amici Curiae, the City of Texas City, the Texas City Independent School District, the County of Galveston, and the College of the Mainland.

OPINION AND JUDGMENT

CARMAN, *Judge:* Plaintiffs move for judgment on the agency record pursuant to USCIT R. 56.1. In their motion plaintiffs seek judicial review of an order of the United States Foreign-Trade Zones Board denying as not in the public interest an application filed by the Port of Houston Authority for special purpose subzone status for plaintiffs' petroleum refinery in Texas City, Texas. U. S. Foreign-Trade Zones Board Order No. 552, 56 Fed. Reg. 67,058 (1991). Plaintiffs base jurisdiction upon 28 U.S.C. § 1581(i) (1988). Defendants oppose the motion.

I. BACKGROUND

The Port of Houston Authority submitted to the United States Foreign-Trade Zones Board (FTZ or Board) in December 1989, on behalf of Hill Petroleum (now plaintiff Phibro), an application for special-pur-

pose subzone status under Foreign-Trade Zone No. 84 for two petroleum refinery sites in Houston and Texas City, Texas. The FTZ Board approved the application for plaintiffs' refinery in Houston, but disapproved the application for plaintiffs' refinery in Texas City. FTZ Board Order No. 552, 56 Fed. Reg. 67,058 (1991).

The application filed on plaintiffs' behalf stated that Houston, Texas City and the State of Texas would benefit greatly if the two subzones were approved. The application further explained that if subzone status were granted, it would enable plaintiffs to retain and expand a $30 million per-year payroll in both cities; maintain and expand a total economic export of over $2 billion per-year in the State of Texas; increase exports from 6.3 million barrels of petroleum products to over 12 million barrels of petroleum, valued at $440 million per year; reduce the United States' balance of trade by increased exports; and preserve two United States refining operations, thereby saving 4,488 direct or indirect jobs and stimulating growth in the United States refinery industry with approximately $36 million in capital improvements at its two refineries.

The application received initial favorable public comment from numerous organizations, companies and government officials. R. 3–9, 11–12. Subsequently, an Examiners Committee consisting of representatives of each of the Board members reviewed the application and public comments, and two members of the Committee, in the summer of 1990, recommended approval. R. 110. In March 1991, the Board learned that Texas City, Galveston County, and Texas City Independent School District, three local taxing authorities, had not received any notice of hearings or of the application. All three requested an opportunity to be heard in opposition to the application. R. 21.

At the time the Board received the taxing authorities' request, the Board still considered the review as ongoing. Due to the lack of input from the taxing authorities the Board decided to hear the views of the community and include them in the administrative record. R. 66. The Board later received numerous expressions of opposition to the application from community officials. These objections were based upon the projected loss of *ad valorem* tax revenues. In 1989, the Texas City refinery paid $606,739 in *ad valorem* taxes to the three local taxing authorities. This figure apparently amounted to less than one percent of the total tax revenues. The County appraiser noted that "[i]f Foreign-Trade status becomes commonplace in our area the taxable wealth which the new school funding system is supposed to spread around, will not materialize to a significant degree." R. 83.

On December 29, 1991, the Board informed the Port of Houston Authority that it had denied the application for the Texas City site. Plaintiffs then commenced this action.

II. Contentions of the Parties

Plaintiffs contend the Court of International Trade (CIT) has subject matter jurisdiction under 28 U.S.C. § 1581(i)(1)–(2), (4) to review a decision by the FTZ Board denying a subzone application. Transcript of Oral

Argument (Tr.) at 8. According to plaintiffs, because the FTZ Act determines whether and when imports brought into FTZs will be subject to customs liability, the Act directly relates to tariffs and duties within the meaning of § 1581(i)(1)–(2), (4). Tr. at 9.

As to the merits of the Board's decision, plaintiffs argue the Board acted arbitrarily, capriciously and abused its discretion when it ignored the applicable statutory criteria for granting or denying subzone status set forth in 19 U.S.C. §§ 81f(b), 81g (1988). Plaintiffs claim the Board wrongfully added a public interest test to its regulations just before the issuance of the Resolution and Order of the Board, which disapproved subzone status for plaintiffs' Texas City refinery as not in the public interest. Plaintiffs urge further that even if Congress had not passed an amendment to the FTZ Act which specifies that property held in a FTZ for export or imported and held for processing is not subject to state and local *ad valorem* taxes, Article 1, §§ 8 and 10 of the Constitution require that result.[1]

Defendants contend the FTZ Act does not provide for judicial review of a denial of a subzone application and only permits judicial review in the limited instance of *revocation* of FTZ grants, citing 19 U.S.C. § 81r(c). According to defendants, the limited grant of reviewability for revocation (to the Court of Appeals for the Circuit in which the zone is located) would be superfluous if all Board actions were judicially reviewable. Furthermore, defendants assert that if the Court determines it has jurisdiction, the Board's denial of the application as not in the public interest was proper and was not arbitrary, capricious or an abuse of discretion.

Amici curiae argue the Port Authority of Houston rather than plaintiff Phibro is the real party in interest in this action because the Port Authority submitted the subzone application at issue. Amici urge, therefore, that plaintiff Phibro lacks standing to bring this suit. Amici further contend that because the Port Authority has not joined this action, the action is not properly before the Court under USCIT R. 17(a). With respect to the decision made by the Board, amici curiae maintain the Board properly considered the lost tax revenue that a grant of subzone status would occasion and that the potential lost revenues required the Board to deny the subzone application.

III. Discussion

The threshold issue presented by this case is whether the CIT has subject matter jurisdiction to review a decision by the FTZ Board denying an application for special subzone status. For the reasons which follow, the Court concludes that it lacks subject matter jurisdiction to review such decisions.

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[1] Article 1, Section 8 of the Constitution provides in part: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States * * *." Article 1, Section 10 of the Constitution states the following in relevant part: "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws * * *."

The primary jurisdictional authority for the CIT resides in 28 U.S.C. § 1581(a)–(i) (1988). Congress added § 1581 to the Customs Court Act of 1980 to delineate when parties may bring suit in the Court. *See* Customs Court Act of 1980, Pub. L. No. 96–417, 94 Stat. 1727 (1980). In enacting § 1581, Congress intended to clarify jurisdictional disputes that had previously arisen between this Court and the district courts, indicating "that the expertise and national jurisdiction of the Court of International Trade * * * be exclusively utilized in the resolution of conflicts and disputes arising out of the tariff and international trade laws * * *." H.R. Rep. No. 1235, 96th Cong., 2d Sess. 27–28 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3739.

Congress enacted § 1581(i) to resolve these jurisdictional disputes. This subsection reads as follows:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for –
>
> (1) revenue from imports or tonnage;
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.
>
> This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

Customs Court Act of 1980, Pub. L. No. 96–417, 94 Stat. 1728, as amended, 28 U.S.C. § 1581(i) (1988).

The courts have reached different conclusions with respect to the scope of this Court's jurisdiction under § 1581(i). Whereas the CIT has tended to view the jurisdictional grant under § 1581(i) broadly,[2] the Court of Appeals for the Federal Circuit and the Supreme Court have

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[2] *See, e.g., Di Jub Leasing Corp. v. United States*, 1 CIT 42, 46, 505 F. Supp. 1113, 1117 (1980), *aff'd in part and rev'd in part on other grounds sub nom. United States v. Bar Bea Truck Leasing Co, Inc.*, 1 Fed. Cir. (T) 151, 713 F.2d 1563 (1983) (review of a customshouse cartman's license revocation held to be intertwined and directly related to the administration and enforcement of law providing for revenue from imports under § 1581(i)(1) and (4)); *National Bonded Warehouse Ass'n v. United States*, 13 CIT 78, 706 F. Supp. 904 (1989) (jurisdiction found under § 1581(i)(4) over a challenge to annual bonded warehouse fees); *Sharp Elecs. Corp. v. United States*, 13 CIT 732, 720 F. Supp. 1014 (1989) (finding that § 1581(i) jurisdiction encompasses administration of a settlement agreement in antidumping action); *National Customs Brokers & Forwarders Ass'n v. United States*, 13 CIT 803, 723 F. Supp. 1511(1989), and 14 CIT 108, 731 F. Supp. 1076 (1990) (jurisdiction under § 1581(i) exists over action seeking to compel issuance of regulations for courier services permitted to enter certain merchandise).

construed the grant narrowly.[3] The effect of these latter decisions has been to constrict the jurisdictional passage to the CIT under § 1581(i). These cases teach that potential litigants must first seek relief in the enumerated subsections § 1581(a)–(h) before invoking the Court's residual jurisdiction under § 1581(i). *Uniroyal,* 69 CCPA at 183–84, 687 F.2d at 472; *Miller,* 5 Fed. Cir. (T) at 124, 824 F.2d at 963; *National Corn Growers,* 6 Fed. Cir. (T) at 84, 840 F.2d at 1558. In addition, litigants may not invoke jurisdiction under § 1581(i) "when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller,* 5 Fed. Cir. (T) at 124, 824 F.2d at 963; *accord Conoco, Inc. v. United States Foreign-Trade Zones Bd.,* 16 CIT ____, ____, 790 F. Supp. 279, 288 (1992) *(Conoco II), appeal docketed,* No. 92–1396 (Fed. Cir. June 8, 1992).

The divergent results in the above cases seem to proceed from ambiguities within the legislative history of § 1581(i). *See Conoco II,* 16 CIT at ____, 790 F. Supp. at 283 (discussing the legislative history's ambiguity). While purporting to establish a "broad jurisdictional grant" to the CIT that would erase the jurisdictional conflict existing between the CIT and the district courts, Congress also indicated that "[s]ubsection (i) is intended only to confer subject matter jurisdiction upon the court, and *not to create any new causes of action not founded on other provisions of law.*" H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3758–59 (emphasis added). The courts, in turn, have interpreted the "other provisions of law" to which Congress refers in its legislative history as paragraphs (1) through (4) of subsection (i). *K Mart,* 485 U.S. at 188, *construed in Conoco II,* 16 CIT at ____, 790 F. Supp. at 283. In view of the relevant legislative history and case law interpretation of § 1581(i), it is clear this subsection will "cover actions not delineated in subsections (a)–(h) when those actions *arise out of* United States laws providing for those more general matters outlined in paragraphs (1)–(4) * * *." *Conoco II,* 16 CIT at ____ 790 F. Supp. at 284.

The exact reach of paragraphs (1) through (4), however, remains ambiguous. As a result, courts heavily scrutinize claims predicated on § 1581(i) to determine whether they fit within the confines of paragraphs (1) through (4). For example, in *K Mart,* plaintiffs sought an injunction against regulations promulgated by the Customs Service which allowed gray-market goods to enter the United States. *K Mart,* 485 U.S. at 181. Plaintiffs asserted the CIT had exclusive jurisdiction over the case under § 1581(i)(3), which vests jurisdiction in that court for causes

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[3] *See, e.g., K Mart Corp. v. Cartier, Inc.,* 485 U.S. 176 (1988) (import prohibition enforced by private plaintiff is not an embargo within § 1581(i)(3) that would give the CIT exclusive jurisdiction); *National Corn Growers Ass'n v. Baker,* 6 Fed. Cir. (T) 70, 840 F.2d 1547 (1988) (§ 1581(i) does not provide jurisdiction for the CIT when the protest procedure of § 1581(b) covers the action); *Miller & Co. v. United States,* 5 Fed. Cir. (T) 122, 824 F.2d 961 (1987), *cert. denied,* 484 U.S. 1041 (1988) (If a remedy under § 1581(a)–(h) is or could have been available, plaintiff asserting § 1581(i) jurisdiction has the burden of showing how that remedy would be "manifestly inadequate."); *United States v. Uniroyal, Inc.,* 69 CCPA 179, 687 F.2d 467 (1982) (jurisdiction under § 1581(i) improper because plaintiff could have filed a protest under § 1581(a) to challenge anticipated assessments).

of action against the United States arising out of any law providing for "embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety." *Id.* at 183. The Supreme Court rejected plaintiffs' claim on the grounds that the import prohibition plaintiffs sought to enforce was not an embargo within the meaning of 1581(i)(3), but rather "a mechanism by which a private party might, at its own option, enlist the Government's aid in restricting the quantity of imports in order to enforce a private right." *Id.* at 185. Because § 1581(i)(3) did not apply to the import prohibition at issue, the Court found the CIT did not have exclusive jurisdiction over the case and jurisdiction was proper in the federal district court. *Id.* at 182–85, 188–89.

K Mart's narrow construction of § 1581(i)(3) parallels the decisions noted previously which restricted access to this Court under § 1581(i). The restrictions observed by *K Mart*, however, differed from the jurisdictional prerequisites recognized in cases such as *Uniroyal, Miller,* and, most recently, *Conoco II.* Whereas these latter cases addressed the *procedural* limitations on § 1581(i) jurisdiction, *K Mart* dealt with the *substantive* limitations within § 1581(i). *See also Olympus Corp. v. United States,* 792 F.2d 315 (2d Cir. 1986), *cert. denied,* 486 U.S. 1042 (1988) (holding that the CIT does not have exclusive jurisdiction under § 1581(i)(3) to hear a challenge to Customs Service regulations permitting parallel importation of "gray market" goods). Accordingly, the *K Mart* Court emphasized that "Congress did not commit to the Court of International Trade's exclusive jurisdiction *every* suit against the Government challenging customs-related laws and regulations." *Id.* at 188 (emphasis in original). The rationale adopted by *K Mart* appears to require this Court to scrutinize closely all claims jurisdictionally predicated on § 1581(i)(1)–(4) and to adhere strictly to the precise language contained in these subsections. As a result, after examining § 1581(i) and the statutory guidelines within the FTZ Act that determine whether the Board should grant a subzone application, this Court concludes that it lacks subject matter jurisdiction in this case.

Two reasons compel this conclusion. First, the statutory guidelines that underlie the Board decision at issue and that form the basis for plaintiffs' claim, do not correspond to § 1581(i). These guidelines state the following: "If the Board finds that the proposed plans and location are suitable for the accomplishment of the purpose of a foreign trade zone under this chapter, and that the facilities and appurtenances which it is proposed to provide are sufficient it shall make the grant." 19 U.S.C. § 81g (1988). This statute requires the Board to grant a FTZ or subzone application if: (1) the applicant's proposed plans and location "are suitable for the accomplishment of the purpose of a foreign trade zone"; and (2) the applicant proposes to provide sufficient "facilities

and appurtenances." Plaintiffs, in turn, predicate jurisdiction on § 1581(i)(1)–(2), (4), which authorize the Court to preside over

> any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for –
>
> (1) revenue from imports or tonnage;
> (2) tariffs, duties fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> * * * * * * *
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection * * *.

28 U.S.C. § 1581(i)(1)–(2), (4). In essence, these provisions only allow jurisdiction over claims that arise from a law that "provide[s] for * * * revenue from imports * * * [,] tariffs [or] duties * * * [, or the] administration and enforcement" over such matters. Plaintiffs' claim under the FTZ Act does not satisfy the jurisdictional requirements of § 1581(i)(1)(2), (4) because 81g's guidelines clearly do not authorize or otherwise "provide for" revenues or tariffs, or the administration and enforcement thereof. Instead, § 81g sets forth the standards that Congress intended the FTZ Board to apply in the FTZ application process. As a result, this Court finds that plaintiff has not stated a claim that allows the Court to exercise jurisdiction under § 1581(i).

A second reason that precludes this Court's jurisdiction is that the purpose of the FTZs is contrary to the Court's authority under § 1581(i) to review claims relating to *imports*. As indicated by the legislative history of the Customs Courts Act of 1980, Congress established § 1581(i) for the purpose of granting the CIT "jurisdiction over those civil actions which arise directly out of an import transaction and involve one of the many international trade laws." H.R. Rep. No. 1235 at 33, *reprinted in* 1980 U.S.C.C.A.N. 3745. The language adopted in § 1581(i)(1)–(4) furthers this purpose because each subsection relies on an import-related transaction for its application. The FTZs, on the other hand, are mechanisms by which Congress seeks to facilitate *export* transactions:

> The purpose of a foreign-trade zone * * * is "to encourage and expedite that part of a nation's foreign trade which its government wishes to free from the restrictions necessitated by customs duties. *In other words, it aims to foster the dealing in foreign goods that are imported, not for domestic consumption, but for reexport to foreign markets and for conditioning, or for combining with domestic products previous to export.*"

S. Rep. No. 905, 73d Cong., 2d Sess. 2 (1934) (quoting the 1918 Report to the Chairman of the Commerce Committee by the Tariff Commission) (emphasis added); *see also* S. Rep. No 1107, 81st Cong., 1st Sess. (1950), *reprinted in* 1950 U.S. Code Cong. Serv. 2533–34 (1952) (FTZs were created "for the purpose of expediting and encouraging foreign commerce"). Because Congress has authorized FTZs for the express purpose

of encouraging exports, the Court concludes that its residual jurisdiction over import-related matters under § 1581(i) does not apply to decisions by the FTZ denying a subzone application. The fact that the FTZ scheme adopted by Congress achieves its ends by eliminating import-related obstacles, ie. duties that would otherwise accrue for goods brought into the United States customs territory, does not make the FTZ sufficiently related to import transactions to support jurisdiction under § 1581(i). Accordingly, this Court holds that it does not have subject matter jurisdiction to review a decision by the FTZ Board denying an application for special subzone status.

It nevertheless could be argued that because the Customs Service inspects activities undertaken in the FTZs, administers drawback, warehousing, and bonding between the FTZs and the customs territory, and collects duties from goods which leave the FTZs for the customs territory, the FTZs are inextricably intertwined with the laws providing for revenues so as to give this Court jurisdiction under § 1581(i)(1)–(2), (4). *See* 19 U.S.C. § 81c(a) (1988 & Supp. II 1992) (indicating, among other things, that goods moving from the FTZs into the United States customs territory are to be treated like imported merchandise and that goods moving from the customs territory into the FTZs are to considered exports for purposes of "draw-back, warehousing, and bonding, or any other provisions of the Tariff Act of 1930"); *Di Jub Leasing Corp. v. United States,* 1 CIT 42, 46, 505 F. Supp. 1113, 1117 (1980), *aff'd in part and rev'd in part on other grounds sub nom. United States v. Bar Bea Truck Leasing Co., Inc.,* 1 Fed. Cir. (T) 151, 713 F.2d 1563 (1983) (reasoning that the "revocation of a cartman's license pursuant to the customs regulations is so intertwined with and directly related to the *administration and enforcement* of the laws providing for revenues from imports" that jurisdiction in the CIT is proper under § 1581(i)(1) and (4)) (emphasis in original). This Court, however, will not give weight to these arguments absent statutory authority to do so. *Cf. Conoco II,* 16 CIT at ____, 790 F. Supp. at 288 ("This Court is powerless to act where its jurisdiction has not been properly invoked."). The CIT can not exercise jurisdiction over all matters simply because they may somehow be related to imports. *See K Mart,* 485 U.S. at 188.

The Court further observes that this case demonstrates the need for judicial oversight of decisions by the FTZ Board. Such oversight is favored by the Administrative Procedures Act. *See Bowen v. Massachusetts,* 487 U.S. 879, 901–04 (1988); *Abbott Labs v. Gardner,* 387 U.S. 136, 140 (1967). Litigants should not be required to play judicial ping-pong in order to determine whether Board decisions are subject to judicial review. In this case, plaintiffs argue the FTZ Board has directly thwarted the will of Congress by denying its application for subzone status on account of the lost assessed valuation for the tax base of the local municipalities. Defendants, on the other hand, assert the government can do as

it wishes and ignore the will of Congress without being held to account.[4] Lack of judicial oversight in matters such as those presented in the instant case will breed administrative arrogance and frustrate commercial and employment opportunities. Nevertheless, this Court is powerless to act without statutory authority. Remedies, if they come at all, must come from Congress.

The Court also finds a clear need for national standards in administering the FTZs and in reviewing FTZ Board decisions. By way of analogy, the Court notes that the constitutional mandate contained in Article 1, Section 8 of the Constitution, which requires "all duties, imposts and excises [to] be uniform throughout the United States," necessitates national standards with respect to import matters.[5] Although FTZs facilitate exports, the need for uniformity in FTZ matters is equally compelling despite the fact such uniformity is not constitutionally required. The FTZs are as integral to United States economic and trade policy as are the import-related laws pertaining to customs, dumping, and countervailing duties. The FTZs, like the customs, dumping, and countervailing duties laws, are instruments which further the particular goals established by the United States with respect to balance of trade, international and domestic commercial development, and employment. These aspects of the FTZs underscore the fact that decisions by the FTZ Board have national consequences which, in turn, necessitate uniform treatment by the courts. Because the CIT has national jurisdiction, this Court appears best able to uniformly interpret the FTZ laws and develop a consistent methodology for reviewing FTZ Board decisions.

The problems presented by this case further demonstrate the need for Congress to "re-examine how to implement the broad jurisdictional mandate it sought to confer upon the Court of International Trade with the enactment of § 1581(i) to ensure compliance with the constitutional mandate requiring uniformity of duties throughout the United States." *Conoco II*, 16 CIT at ____, 790 F. Supp. at 289. Perhaps the enumerated categories contained in § 1581(i) should give way to a more general provision that grants the CIT jurisdiction over all customs-related matters that require national standards. Until Congress clarifies the CIT's authority, the confusion over this Court's jurisdiction will persist and

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[4] The Court notes that the government's arguments in this case and other FTZ cases are particularly probative of the problems which exist in the CIT's authority under § 1581(i). In this action the government argues the FTZ Act precludes judicial review of FTZ Board decisions in all instances except for the revocation of a FTZ grant under 19 U.S.C. § 81r. Therefore, the government urges the FTZ Board can be as arbitrary and capricious as it would like in its decision-making except as to matters covered by § 81r. Tr. at 20–21. In addition, the government concedes that if this Court were to find that FTZ Board decisions were subject to judicial review, jurisdiction would be proper in the CIT under § 1581(i)(1)(2) and (4). Tr. at 22. The government adopted virtually the same position before the United States District Court for the District of Columbia when it argued the CIT has exclusive jurisdiction under 1581(i)(4) to review decisions by the Board. Defendant's Mem. at 6–7, *Miami Free Zone Corp. v. Foreign-Trade Zones Bd*, 803 F. Supp. 442 (D.D.C. 1992) Nevertheless, it appears that the government's view in this case and in *Miami Free Zone* clearly contradicts the view it adopted in *Conoco II* where it argued that *no* court has subject matter jurisdiction to review decisions by the FTZ Board. *See Conoco II*, 16 CIT at ____, 790 F. Supp. at 289. The fact that the government has succeeded with these divergent arguments in this case, in *Miami Free Zone*, and in *Conoco II*, further underscores the need to rectify the problems spawned by this Court's jurisdictional grant.

[5] This constitutional provision is also the foundation for this Court's national jurisdiction. *See* H.R. Rep. No. 1235 at 29, *reprinted in* 1980 U.S.C.C.A.N. at 3741.

potential litigants will continue to waste time and money in futile efforts to secure judicial review of their legitimate grievances. In the meantime, this nation's ability to compete around the globe will suffer.

IV. Conclusion

The Court holds that plaintiffs' motion for judgment upon the agency record is denied for lack of subject matter jurisdiction.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C93/59 5/17/93 Musgrave, J.	Kowa American Corp.	81–10–01358	Various provisions of Schedule 3, TSUS, various rates	376.56 various rates	Agreed statement of facts	New York Jackets and pants except vests, reversible garments, insert fabric garments, and garments with outershell fabrics which have a cire or other finish produced by calendaring or other mechanical means

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V93/10 5/17/93 DiCarlo, J.	Supermail Cargo, Inc.	90–06–00295	Transaction value	19 U.S.C. § 1401a charges by the Hong Kong tailors for cut, make and trim operations, plus the value of fabric, materials or other assists, plus packing costs in accordance with Customs Service Decisions 81–92 (TAA #8) and 81–72 (TAA #10)	American Air Parcel Forwarding Co., et al, *v.* United States, rev'd sub nom E.C. McAfee Company, et al. 6 Fed. Cir. (T) 92 1988.	Los Angeles Made to measure wearing apparel

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